

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN THE MATTER OF TERRA FIRMA INVESTMENTS
(GP) LIMITED (for and on behalf of
The six limited partnerships
Constituting the Terra Firma
Capital Partners II Fund), and
TERRA FIRMA INVESTMENTS (GP) 3
LIMITED (for and on behalf of
Terra Firma Capital Partners
III, L.P.),

Plaintiffs,

vs.

Index No.
09-CIV-10459

CITIGROUP INC., CITIBANK
N.A., CITIGROUP GLOBAL MARKETS
LIMITED and CITIGROUP GLOBAL
MARKETS, INC.,

Defendants.

-----X
CONFIDENTIAL

July 19, 2010
9:07 a.m.

Videotaped Deposition of MARIANNE DeMARIO,
taken by Defendants, pursuant to Notice,
at the offices of Paul, Weiss, Rifkind,
Wharton & Garrison LLP, 1285 Avenue of the
Americas, New York, New York, before TAMMEY M.
PASTOR, a Registered Professional Reporter,
Certified LiveNote Reporter and Notary Public
within and for the State of New York.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 47

1 MARIANNE DeMARIO

09:49:46 2 Q. So you, just so I understand
09:49:49 3 this, Ms. DeMario, you've been instructed by
09:49:51 4 counsel with respect to the tortious
09:49:55 5 interference claim now and that's all we're
09:49:57 6 talking about; correct?

09:49:58 7 MR. GRAVANTE: Objection to the
09:49:58 8 form.

09:49:58 9 Q. Let me clarify. We are talking
09:50:00 10 about the tortious interference claim; correct?

09:50:02 11 MR. GRAVANTE: Objection to the
09:50:02 12 form.

09:50:02 13 A. Yes.

09:50:02 14 Q. With respect to the tortious
09:50:05 15 interference claim it's your testimony you've
09:50:08 16 been asked to assume the level of EBITDA lost
09:50:12 17 by EMI; is that correct?

09:50:16 18 A. That's correct.

09:50:21 19 Q. So explain for me again your
09:50:22 20 assignment with that assumption.

09:50:26 21 A. My assignment is to quantify the
09:50:32 22 loss of value that resulted from -- that
09:50:38 23 results from a loss of EBITDA at a certain
09:50:40 24 level.

09:50:46 25 Q. And that loss of value will

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 48

1 MARIANNE DeMARIO

09:50:50 2 translate into a level of damages upon which
09:50:53 3 you're opining in your report?

09:50:56 4 A. That's correct.

09:51:01 5 Q. As you sit here now, other than
09:51:05 6 the Citigroup analyst report to which you
09:51:07 7 referenced, can you identify any other conduct
09:51:11 8 that serves as the basis for this damages
09:51:14 9 calculation on the tortious interference claim?

09:51:17 10 A. Not that I can recall.

09:51:19 11 Q. Are you opining on the level of
09:51:30 12 damages in euros in this case?

09:51:36 13 A. Yes.

09:51:37 14 Q. Why are you doing that?

09:51:38 15 A. Counsel asked me to express it in
09:51:43 16 euros because the funds at issue in this case,
09:51:48 17 Fund 2 and Fund 3 accept money, accept
09:51:54 18 investments in euros. And pay back their funds
09:51:56 19 in euros.

09:52:00 20 Q. But you understand, do you not,
09:52:01 21 that the acquisition of EMI was made in pounds;
09:52:06 22 correct?

09:52:06 23 A. It's my understanding that the
09:52:08 24 acquisition of EMI was made in pounds, but that
09:52:12 25 Plaintiffs received the investments from their

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 49

1 MARIANNE DeMARIO

09:52:16 2 investors in euros.

09:52:22 3 Q. Who in your last sentence are the
09:52:24 4 investors?

09:52:25 5 A. The individual investors in the
09:52:27 6 Terra Firma funds.

09:52:30 7 Q. So you're saying that the
09:52:31 8 individual investors that invest in the Terra
09:52:34 9 Firma funds make those investments in euros;
09:52:37 10 correct?

09:52:37 11 A. That's my understanding.

09:52:39 12 Q. But that the actual acquisition
09:52:41 13 that's the subject of the lawsuit was made by
09:52:45 14 Terra Firma or its affiliates in pounds;
09:52:48 15 correct?

09:52:48 16 A. That's my understanding.

09:52:52 17 Q. Notwithstanding that your damages
09:52:54 18 are reflected in your report in euros?

09:53:00 19 A. My damages are in euros in my
09:53:01 20 report, that is correct.

09:53:03 21 Q. That is at the direction of
09:53:05 22 counsel that you've done it that way?

09:53:06 23 A. Correct.

09:53:09 24 Q. Do you have an understanding
09:53:10 25 whether the value of the pounds versus the euro

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 50

1 MARIANNE DeMARIO

09:53:14 2 has fluctuated in the time period between 2007
09:53:17 3 and 2010?

09:53:18 4 A. Yes.

09:53:19 5 Q. Would you agree, Ms. DeMario,
09:53:20 6 that in May 2007, 1 pound used to equal about
09:53:27 7 1.46 euros?

09:53:32 8 A. I believe that's correct, but I'd
09:53:33 9 like to look at my report to confirm that's the
09:53:36 10 accurate number.

09:53:37 11 Q. Why don't we mark your report
09:53:38 12 then and let you do this. It is no mystery
09:53:41 13 here. Why don't we mark as DeMario Exhibit 1
09:53:45 14 Ms. DeMario's report.

09:53:45 15 (DeMario Exhibit 1 for
09:53:45 16 identification, Expert Report of Marianne
09:54:05 17 DeMario, no production numbers.)

09:54:05 18 Q. Take a look through that,
09:54:08 19 Ms. DeMario. Take a look through that and let
09:54:10 20 me just ask you some preliminaries. What do
09:54:16 21 you understand that document to be?

09:54:45 22 A. This appears to be a copy of my
09:54:47 23 report. Due to the extent of it, it is hard
09:54:53 24 for me to assure it's complete. But it appears
09:54:55 25 to be a complete copy of my report.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 51

1 MARIANNE DeMARIO

09:54:57 2 Q. Understand. Let me represent to
09:55:00 3 you and for the record, the copy that we've
09:55:02 4 marked as DeMario Exhibit 1 is our
09:55:05 5 understanding of -- is our understanding to be
09:55:10 6 a copy of your report, but we included in the
09:55:16 7 back your revised appendix.

09:55:18 8 Do you understand what I'm
09:55:19 9 referring to when I say your revised appendix?

09:55:23 10 A. I do not.

09:55:24 11 Q. Do you understand you had
09:55:25 12 submitted after the date of your report a
09:55:27 13 revised appendix?

09:55:30 14 A. I don't recall that.

09:55:31 15 Q. Okay. You don't recall that one
09:55:33 16 way or the other?

09:55:33 17 A. I do not.

09:55:33 18 Q. I will represent to you we did
09:55:37 19 receive a revised appendix that appeared to
09:55:39 20 have some changes made and that's the appendix
09:55:42 21 that is included in what's been marked as
09:55:45 22 DeMario Exhibit 1; is that fair?

09:55:47 23 A. Which appendix was revised?

09:55:51 24 Q. Do you know which appendix was
09:55:52 25 revised?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 52

1 MARIANNE DeMARIO

09:55:53 2 A. As I previously testified, I
09:55:58 3 don't recall submitting a revised appendix.

09:56:02 4 Q. Is it possible your staff made
09:56:05 5 calculations or counsel made calculations or
09:56:07 6 revisions that found their way into a revised
09:56:11 7 appendix?

09:56:12 8 MR. GRAVANTE: Objection to the
09:56:17 9 form.

09:56:17 10 A. I would like to know which
09:56:18 11 appendix it was. It may be an appendix that
09:56:23 12 has nothing to do with calculations.

09:56:25 13 Q. That's fair.

09:56:26 14 A. It's certainly possible my staff
09:56:28 15 may have done something minor and resubmitted
09:56:34 16 it.

09:56:34 17 Q. But you're not aware one way or
09:56:36 18 the other?

09:56:36 19 A. I don't recall.

09:56:36 20 Q. Let's get back to the questions
09:56:39 21 on euros. Can you turn for me, if you would,
09:56:42 22 to your Exhibit L1.

09:57:06 23 Do you have that?

09:57:09 24 A. Yes.

09:57:10 25 Q. If you look at the bottom of

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 53

1 MARIANNE DeMARIO

09:57:12 2 Exhibit L1 under footnote 3 it says "currency
09:57:16 3 converted using average May 2007 pounds to
09:57:20 4 euro exchange rate of 1.4677."

09:57:24 5 Do you see that?

09:57:25 6 A. Yes.

09:57:27 7 Q. Does that refresh your
09:57:28 8 recollection that in May 2007 the exchange
09:57:33 9 rate between pounds to euros was 1 to 1.4677
09:57:38 10 euros?

09:57:39 11 A. Yes.

09:57:40 12 Q. Turn quickly -- let me ask you,
09:57:43 13 do you recall that the exchange rate between
09:57:48 14 pounds and euros in June 2010 was 1 pound to
09:57:56 15 1.19 euros?

09:58:00 16 A. That sounds generally correct.

09:58:03 17 Q. Okay.

09:58:04 18 A. If I can turn to the exhibit.

09:58:05 19 Q. Of course. Yes it is Exhibit M1.
09:58:07 20 It is the second page of Exhibit M1. Footnote
09:58:15 21 4. I take it back it is either page it's
09:58:18 22 reflected.

09:58:18 23 If you look at footnote 4 of your
09:58:22 24 Exhibit M1 it states "Currency converted using
09:58:26 25 June 1, 2010 pounds to euros exchange rate of

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 54

1 MARIANNE DeMARIO

09:58:29 2 1.1980."

09:58:32 3 Do you see that?

09:58:32 4 A. Yes.

09:58:33 5 Q. Does that refresh your
09:58:35 6 recollection that that was the pounds to euro
09:58:39 7 exchange rate in or around June 1, 2010?

09:58:43 8 A. Yes.

09:58:50 9 Q. So to understand this, so is it
09:58:54 10 fair to say, Ms. DeMario, if Terra Firma
09:58:56 11 suffered damages of 100 pounds in May 2007,
09:59:01 12 that would have been equal to about 146 euros
09:59:05 13 at that time; is that right?

09:59:09 14 A. That's correct.

09:59:12 15 Q. But that same level of damages
09:59:13 16 measured in June 2010, 146.77 euros would in
09:59:19 17 fact equal about 122 pounds in June 2010; isn't
09:59:23 18 that correct?

09:59:24 19 A. If we just want to use math and
09:59:29 20 translate pounds into euros at two separate
09:59:32 21 dates, then that's correct. Yes.

09:59:35 22 Q. Do you agree therefore that by
09:59:37 23 simply reflecting your damages opinions in
09:59:39 24 euros that any Plaintiff award will result in
09:59:45 25 approximately 20 percent higher recovery if it

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 55

1 MARIANNE DeMARIO

09:59:48 2 was measured in pounds?

09:59:50 3 MR. GRAVANTE: Objection to the
09:59:50 4 form.

09:59:52 5 A. I don't agree with that.

09:59:53 6 Q. Why not?

09:59:54 7 A. Because at the end of the day
09:59:57 8 Terra Firma needs to pay back its investors in
10:00:01 9 euros. So if they were to receive 100 euros,
10:00:09 10 but had to pay back -- sorry, they were to
10:00:12 11 receive 100 pounds, but had to pay back their
10:00:16 12 investors at a higher number than that, they
10:00:21 13 would need to receive that additional money in
10:00:25 14 order to be made whole.

10:00:29 15 Q. And it's your opinion that they
10:00:32 16 would need to recover amounts in euros in order
10:00:36 17 to be made whole; is that your opinion?

10:00:39 18 MR. GRAVANTE: Objection to the
10:00:39 19 form.

10:00:41 20 A. In order for them to pay back
10:00:44 21 their investors, because they have to pay back
10:00:47 22 their investors in euros it needs to be
10:00:52 23 quantified in euros. Or else they would be
10:00:55 24 receiving an amount less than the amount they
10:00:57 25 would need to pay back their investors.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 56

1 MARIANNE DeMARIO

10:00:59 2 Q. And is that explanation laid out
10:01:02 3 in your report anywhere?

10:01:05 4 A. I don't know if it is or not, I'd
10:01:07 5 have to read through it again.

10:01:11 6 Q. But if we were, if damages were
10:01:13 7 to be measured in pounds, you would agree that
10:01:17 8 your currency conversion calculation here would
10:01:22 9 inflate the amount of pounds that would be
10:01:23 10 awarded?

10:01:26 11 MR. GRAVANTE: Objection to the
10:01:26 12 form.

10:01:26 13 A. I don't understand that question.

10:01:30 14 Q. Isn't it true, Ms. DeMario, that
10:01:32 15 if an award of damages here was to be made in
10:01:36 16 pounds, that simply by virtue of your currency
10:01:40 17 conversion that you have inflated the amount of
10:01:43 18 pounds that would be awarded in damages?

10:01:45 19 MR. GRAVANTE: Objection to the
10:01:47 20 form, asked and answered.

10:01:48 21 A. If you're asking me if it was to
10:01:53 22 be awarded in pounds, and we took the amount of
10:01:57 23 euros that I've calculated and translated it
10:02:03 24 back into pounds, mathematically the answer is
10:02:08 25 yes, that number would be different.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 57

1 MARIANNE DeMARIO

10:02:19 2 Q. Let me go through some background
10:02:20 3 with you quickly, Ms. DeMario. When were you
10:02:23 4 retained for this case?

10:02:24 5 A. I'd say late winter of 2010.

10:02:31 6 Q. And who retained you?

10:02:33 7 A. Terra Firma retained me.

10:02:40 8 Q. Who at Terra Firma retained you?

10:02:42 9 A. It went through the attorneys.

10:02:45 10 The counsel at Boies actually retained me.

10:02:47 11 Q. Who at Boies retained you?

10:02:50 12 A. Karen Dyer.

10:02:58 13 MR. GRAVANTE: D-Y-E-R.

10:03:00 14 Q. What are you being paid for your
10:03:02 15 work in this case?

10:03:06 16 A. I don't understand that question.

10:03:07 17 Q. Are you being paid for your work
10:03:08 18 in connection with this case?

10:03:09 19 A. Yes.

10:03:12 20 Q. What's the rate at which you're
10:03:13 21 being paid?

10:03:14 22 A. I am being paid at \$550 per hour.

10:03:21 23 Q. Does that rate apply to your work
10:03:23 24 individually or does that go to your consulting
10:03:25 25 firm?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 94

1 MARIANNE DeMARIO

10:55:27 2 A. To a hypothetical willing and
10:55:31 3 able buyer. And to a hypothetical willing and
10:55:34 4 able seller for that matter.

10:55:37 5 Q. Is the price that an actual buyer
10:55:41 6 and seller agree upon for a company irrelevant
10:55:45 7 to a fair market value of that company?

10:55:48 8 MR. GRAVANTE: Objection to the
10:55:50 9 form.

10:55:50 10 A. Can I have that read back,
10:56:01 11 please.

10:56:01 12 (The pending question was read as
10:56:01 13 follows:

10:55:37 14 "Question: Is the price that an
10:55:40 15 actual buyer and seller agree upon for a
10:55:44 16 company irrelevant to a fair market value
10:55:46 17 of that company?")

10:56:02 18 A. It's not irrelevant, but it
10:56:04 19 doesn't answer the question of what is fair
10:56:08 20 market value.

10:56:08 21 Q. So it is a relevant factor with
10:56:11 22 respect to a fair market value determination?

10:56:13 23 MR. GRAVANTE: Objection to the
10:56:15 24 form.

10:56:15 25 A. It's something that should be

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 95

1 MARIANNE DeMARIO

10:56:18 2 looked at and considered.

10:56:19 3 Q. And is it also true that a stock
10:56:24 4 price of a company can be a relevant factor to
10:56:29 5 a fair market value determination of a company?

10:56:33 6 A. Yes, that's true.

10:56:37 7 Q. In a situation where a buyer was
10:56:40 8 considering an acquisition of another company,
10:56:42 9 would the potential buyer's projections of the
10:56:48 10 projected earnings of the target company be
10:56:51 11 relevant to a fair market value determination
10:56:53 12 of that company?

10:56:56 13 A. You keep using the term relevant.
10:56:58 14 And relevant is a very broad wishy-washy word.
10:57:09 15 It's inappropriate to use the projections of a
10:57:14 16 specific potential buyer in determining fair
10:57:20 17 market value.

10:57:23 18 Q. Why is that?

10:57:23 19 A. Because fair market value is the
10:57:27 20 value to a hypothetical willing buyer. It is
10:57:32 21 the value to any buyer, not the value to a
10:57:36 22 particular buyer.

10:57:40 23 Q. And it's your testimony then that
10:57:43 24 projections held by a hypothetical buyer of the
10:57:47 25 earnings of the target company are not a

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 96

1 MARIANNE DeMARIO

10:57:51 2 relevant factor in determining fair market
10:57:53 3 value of that company; is that your testimony?

10:57:56 4 MR. GRAVANTE: Objection to the
10:57:57 5 form.

10:57:57 6 A. I didn't understand it. So I
10:58:01 7 don't know if it was my testimony. Perhaps you
10:58:04 8 could restate that.

10:58:07 9 Q. Well, you keep pointing me back
10:58:09 10 to a hypothetical buyer. And my question is,
10:58:12 11 even if you look at a hypothetical buyer, would
10:58:17 12 the projections of future earnings held by the
10:58:22 13 hypothetical buyer of the acquisition target be
10:58:27 14 a relevant factor to a fair market value
10:58:30 15 determination? I'll finish, now you can
10:58:31 16 answer.

10:58:32 17 MR. GRAVANTE: Objection to the
10:58:32 18 form.

10:58:32 19 Q. He can object. Now you can
10:58:34 20 answer.

10:58:35 21 A. I don't know what you mean by
10:58:37 22 held by.

10:58:42 23 Q. In your experience do buyers of
10:58:44 24 companies in contemplating their decision to
10:58:47 25 buy a company develop projections of the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 97

1 MARIANNE DeMARIO

10:58:52 2 financial performance of the company they are
10:58:54 3 seeking to acquire?

10:58:58 4 A. They may develop projections of a
10:59:02 5 hypothetical company that they expect to have
10:59:06 6 and manage after the acquisition.

10:59:08 7 Q. And is your testimony that those
10:59:11 8 types of projections are irrelevant to a fair
10:59:14 9 market value determination of that target
10:59:16 10 company?

10:59:16 11 MR. GRAVANTE: Objection to the
10:59:19 12 form.

10:59:19 13 A. Those projections, the ones that
10:59:22 14 have embedded within them specific synergies or
10:59:26 15 specific value that can be brought by a
10:59:28 16 specific buyer, if you use those projections
10:59:33 17 you would be determining investment value, not
10:59:35 18 fair market value.

10:59:37 19 Q. So your answer is no, those
10:59:40 20 projections are not relevant to a fair market
10:59:43 21 value determination?

10:59:45 22 MR. GRAVANTE: Objection to the
10:59:46 23 form.

10:59:46 24 A. Again, you keep using the word
10:59:48 25 relevant, which I find far too broad. As an

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 98

1 MARIANNE DeMARIO

10:59:56 2 expert and a valuation practitioner, it is hard
10:59:58 3 for me to say that information is not relevant.
11:00:03 4 It's another thing for me to say the
11:00:05 5 information is inappropriate to use or is
11:00:06 6 information that I would not use.

11:00:08 7 Q. So let's use your terms. Is it
11:00:10 8 inappropriate to use the projections held by a
11:00:14 9 hypothetical buyer of a company being acquired
11:00:23 10 for purposes of determining fair market value
11:00:25 11 of that target company?

11:00:39 12 A. Can I have that read back,
11:00:41 13 please.

11:00:41 14 (The pending question was read as
11:00:41 15 follows:

11:00:09 16 "Question: So let's use your
11:00:10 17 terms. Is it inappropriate to use the
11:00:13 18 projections held by a hypothetical buyer
11:00:17 19 of a company being acquired for purposes
11:00:24 20 of determining fair market value of that
11:00:26 21 target company?")

11:00:42 22 A. It's inappropriate to use
11:00:43 23 projections of a specific buyer that include
11:00:50 24 the specific motivations or characteristics of
11:00:53 25 that specific buyer when determining fair

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 99

1 MARIANNE DeMARIO

11:00:55 2 market value.

11:01:10 3 Q. Is it inappropriate to consider

11:01:15 4 for a fair market value determination of a

11:01:17 5 target company the financial plans or

11:01:27 6 managerial improvements that a hypothetical

11:01:31 7 buyer expects to undertake after the

11:01:35 8 acquisition of a target company?

11:01:38 9 MR. GRAVANTE: Objection to the

11:01:43 10 form.

11:01:43 11 A. When you're determining fair

11:01:48 12 market value it's not inappropriate to include

11:01:53 13 financial improvements that any hypothetical

11:01:57 14 buyer could be expected to make.

11:02:00 15 What's inappropriate is to

11:02:02 16 include specific characteristics or specific

11:02:06 17 plans for a specific buyer.

11:02:30 18 Q. So how do you determine the

11:02:35 19 appropriate projections that can be utilized

11:02:39 20 for a fair market value determination held by a

11:02:41 21 hypothetical buyer?

11:02:45 22 A. Could you either repeat that or

11:02:46 23 she can read it back to me.

11:02:56 24 Q. She can read it back.

11:02:57 25 (The pending question was read as

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 100

1 MARIANNE DeMARIO

11:02:57 2 follows:

11:02:30 3 "Question: So how do you determine
11:02:34 4 the appropriate projections that can be
11:02:38 5 utilized for a fair market value
11:02:40 6 determination held by a hypothetical
11:02:41 7 buyer?")

11:02:58 8 A. Do you want me to answer in
11:03:02 9 general?

11:03:02 10 Q. Sure.

11:03:03 11 A. A good starting point is to use
11:03:13 12 the projections that management has prepared. I
11:03:22 13 would say that's the best starting point.

11:03:30 14 Q. Whose management?

11:03:30 15 A. The management of the target
11:03:31 16 company.

11:03:35 17 Q. So is it your testimony that
11:03:36 18 projections developed by the management of a
11:03:41 19 target company would be an appropriate factor
11:03:46 20 to look at in determining fair market value of
11:03:49 21 that company?

11:03:49 22 A. Yes.

11:03:52 23 Q. But it would not be appropriate
11:03:54 24 to look at projections developed by a specific
11:03:58 25 company looking at buying that target company;

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 103

1 MARIANNE DeMARIO

11:06:28 2 A. I'm not limiting it to those two
11:06:31 3 factors, but yes.

11:06:32 4 Q. Right. But among other factors
11:06:36 5 it's those types of considerations that you're
11:06:39 6 testifying are inappropriate to consider in a
11:06:42 7 fair market value determination?

11:06:44 8 A. Yes.

11:06:53 9 Q. Would -- well withdrawn.

11:07:00 10 Could prior bids for a target
11:07:05 11 company be an appropriate thing to consider in
11:07:10 12 a fair market value determination?

11:07:14 13 A. I think they are appropriate to
11:07:15 14 consider, yes.

11:07:16 15 Q. Would investment analysts' target
11:07:18 16 prices for a target company be relevant to a
11:07:22 17 fair market value -- sorry. Let me put it in
11:07:24 18 your terms.

11:07:25 19 Would investment analysts' price
11:07:28 20 targets of a target company be an appropriate
11:07:31 21 factor to consider in a fair market value
11:07:33 22 determination?

11:07:37 23 A. I would say yes, but I would -- I
11:07:41 24 would use the term consider. I consider the
11:07:44 25 term consider to be very similar to the term

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 104

1 MARIANNE DeMARIO

11:07:46 2 relevant. It's hard for me to say that I would
11:07:49 3 not consider information about the company or
11:07:57 4 about the stock price or what other people are
11:07:59 5 thinking about the stock price.

11:08:06 6 Q. Let's turn back to your report.

11:08:07 7 Can you turn to paragraph 8 of your report.

11:08:17 8 You say in paragraph 8 "I was asked to
11:08:20 9 determine the fair market value of EMI
11:08:22 10 immediately prior to Terra Firma submitting a
11:08:24 11 bid to purchase EMI on May 21, 2007."

11:08:30 12 What do you mean by the term
11:08:32 13 "immediately prior" In that sentence?

11:08:40 14 A. What I'm referring to here is the
11:08:41 15 fact that I am valuing EMI as a stand-alone
11:08:44 16 company and not EMI after it's been purchased
11:08:49 17 by a specific buyer.

11:08:54 18 Q. What do you mean by stand-alone
11:08:55 19 company?

11:08:58 20 A. That it does not include the
11:09:02 21 specific plans and specific characteristics of
11:09:06 22 a specific buyer.

11:09:11 23 Q. That's because it's your opinion
11:09:13 24 it's inappropriate to consider those specific
11:09:16 25 characteristics in a valuation of EMI?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 105

1 MARIANNE DeMARIO

11:09:19 2 MR. GRAVANTE: Objection to the
11:09:23 3 form.

11:09:23 4 A. It's my opinion that it's
11:09:25 5 inappropriate to include that in a calculation
11:09:27 6 of fair market value. It's my understanding
11:09:32 7 that fair market value is the proper value to
11:09:35 8 be used here.

11:09:40 9 Q. The next sentence in paragraph 8
11:09:42 10 you say "As such, my analysis does not take
11:09:45 11 into account synergies or other expectations of
11:09:48 12 Terra Firma management."

11:09:52 13 What do you mean by -- sorry, did
11:09:54 14 I read that wrong. "As such, my analysis does
11:09:57 15 not take into account synergies or other
11:10:01 16 expectations of Terra Firma management."

11:10:03 17 What do you mean when you refer
11:10:04 18 to "Synergies or other expectations of Terra
11:10:08 19 Firma management?"

11:10:09 20 A. Those are the specific
11:10:13 21 characteristics or intentions of a specific
11:10:15 22 buyer, in this case Terra Firma.

11:10:19 23 Q. Do you have an understanding of
11:10:21 24 whether Terra Firma believed that it could add
11:10:25 25 value to EMI through synergies or other

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 106

1 MARIANNE DeMARIO

11:10:32 2 managerial or financial initiatives?

11:10:37 3 A. It is my understanding that Terra
11:10:39 4 Firma believed it could add value, yes.

11:10:44 5 Q. And if another company such as
11:10:49 6 Warner Music Group was interested in purchasing
11:10:56 7 EMI, would you expect that Warner Music Group
11:11:00 8 believed that it could provide synergies or
11:11:05 9 other value through managerial or financial
11:11:08 10 initiatives?

11:11:09 11 MR. GRAVANTE: Objection to the
11:11:15 12 form.

11:11:15 13 A. Are you asking me specifically
11:11:17 14 about Warner Music Group or any other potential
11:11:19 15 buyer?

11:11:19 16 Q. Let's make it any other potential
11:11:21 17 buyer. That's fair.

11:11:22 18 A. I would expect that if you looked
11:11:27 19 at the entire population of potential buyers,
11:11:30 20 some of them would think that they could add
11:11:32 21 value to the company. Some of them may think
11:11:38 22 that they would not be able to add value at
11:11:41 23 all. It would depend.

11:11:47 24 Q. If you turn just briefly to page
11:11:49 25 31 of your report, Ms. DeMario. Look at

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 107

1 MARIANNE DeMARIO

11:11:59 2 footnote 56. You cite to a text authored by
11:12:04 3 Shannon Pratt, Robert Reilly and Robert
11:12:07 4 Schweihs valuing the business, fourth edition.
11:12:11 5 Do you see that?

11:12:16 6 A. Yes, just give me a second. I
11:12:18 7 want to see what I'm referencing.

11:12:20 8 Q. Sure. Feel free.

11:12:26 9 A. Okay.

11:12:27 10 Q. Do you consider that text to be
11:12:28 11 an authoritative text in connection with
11:12:31 12 valuations?

11:12:36 13 A. It's a well known text.

11:12:37 14 MR. CARNEY: Let's mark as DeMario
11:12:40 15 2 selected pages from a text called
11:12:47 16 Valuing a Business, the Analysis and
11:12:49 17 Appraisal of Closely Held Companies,
11:12:51 18 Fourth Edition By Pratt, Reilly and
11:12:55 19 Schweihs.

11:12:57 20 (DeMario Exhibit 2 for
11:12:47 21 identification, Valuing a Business, the
11:12:48 22 Analysis and Appraisal of Closely Held
11:12:50 23 Companies, Fourth Edition By Pratt, Reilly
11:12:55 24 and Schweihs, no production numbers.)

11:13:28 25 Q. Let me note for the record we

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 116

1 MARIANNE DeMARIO

11:25:49 2 downside case. It gives a little, very brief
11:25:52 3 background into what each of those cases means.
11:25:57 4 And it discusses the IRR for each of those
11:26:00 5 cases.

11:26:01 6 Q. What is the IRR?

11:26:02 7 A. Internal rate of return.

11:26:05 8 Q. And the first bullet it says "The
11:26:07 9 team recommends to the IAC to recommended to
11:26:12 10 the GP an offer of 285 P, subject to the
11:26:16 11 availability of an additional 170 million
11:26:20 12 pounds equity bridge/equity co-investment. In
11:26:23 13 the event that such an equity bridge is not
11:26:26 14 available a price of 265 P is recommended."

11:26:28 15 Do you see that?

11:26:29 16 A. Yes.

11:26:30 17 Q. Do you understand that Terra
11:26:34 18 Firma management is representing to the IAC an
11:26:38 19 offer for EMI of up to 285 P subject to certain
11:26:43 20 financing and if that financing is not
11:26:45 21 available, an offer for EMI of 265 P per share?

11:26:53 22 A. Yes.

11:26:56 23 Q. Is it your testimony,
11:26:58 24 Ms. DeMario, that this recommendation is
11:27:08 25 something that is not an appropriate factor to

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 117

1 MARIANNE DeMARIO

11:27:10 2 consider in determining the fair market value
11:27:13 3 of EMI?

11:27:15 4 MR. GRAVANTE: Objection to the
11:27:16 5 form.

11:27:18 6 A. Again, I would think and would
11:27:21 7 need to answer that I would think that all
11:27:24 8 information is appropriate to consider.

11:27:33 9 Q. But haven't you just testified
11:27:34 10 that the specific value assigned or --
11:27:34 11 withdrawn.

11:27:44 12 Haven't you just testified that
11:27:45 13 the characteristic of a specific value held by
11:27:49 14 a specific company for a target company is
11:27:54 15 inappropriate to be considered in a fair market
11:27:58 16 value determination?

11:28:00 17 MR. GRAVANTE: Objection to the
11:28:00 18 form.

11:28:01 19 A. That wasn't my testimony. My
11:28:05 20 testimony all along has been that I feel it's
11:28:07 21 appropriate to consider all information.

11:28:11 22 My testimony is that it's
11:28:13 23 inappropriate to use that information as the
11:28:17 24 fair market value.

11:28:19 25 Q. Okay. So, Terra Firma's

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 118

1 MARIANNE DeMARIO

11:28:24 2 recommendation that the IAC approve a bid of at
11:28:29 3 least 265 P and up to 285 P for EMI is
11:28:36 4 something that is inappropriate to use in your
11:28:39 5 fair market value determination for EMI?

11:28:42 6 A. Yes.

11:28:46 7 Q. That's despite the fact that
11:28:49 8 Terra Firma management is demonstrating a
11:28:52 9 willingness to purchase EMI at a price of at
11:28:56 10 least 265 P with a potential of purchasing it
11:29:01 11 at 285 P?

11:29:19 12 A. May I have that read back,
11:29:20 13 please.

11:29:20 14 (The pending question was read as
11:29:20 15 follows:

11:28:46 16 "Question: That's despite the fact
11:28:47 17 that Terra Firma management is
11:28:51 18 demonstrating a willingness to purchase
11:28:54 19 EMI at a price of at least 265 P with a
11:28:59 20 potential of purchasing it at 285 P?")

11:29:21 21 A. I think it is inappropriate to
11:29:23 22 use this number. It's inappropriate because it
11:29:27 23 would not represent fair market value. It's
11:29:32 24 inappropriate because it would more closely
11:29:34 25 represent investment value you. It's

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 119

1 MARIANNE DeMARIO

11:29:36 2 inappropriate because Terra Firma did not have
11:29:39 3 access to all the relevant facts.

11:29:45 4 It's also -- actually I'll stop
11:29:51 5 it at that. It is certainly inappropriate for
11:29:53 6 those two reasons.

11:29:54 7 Q. Any other reasons why it's
11:29:55 8 inappropriate?

11:29:56 9 A. What I was going to state is
11:29:58 10 really a subset of the fact it would be
11:30:02 11 investment value. Those are the reasons that I
11:30:04 12 can think of right now.

11:30:10 13 Q. All right. You can put that
11:30:11 14 document aside.

11:30:14 15 Let's mark as DeMario Exhibit 4 a
11:30:23 16 multipage document Bates numbered TF 0000992819
11:30:30 17 through 826.

11:30:31 18 (DeMario Exhibit 4 for
11:30:31 19 identification, Meeting Minutes 4/20/07,
11:30:23 20 production numbers TF 0000992819 through
11:30:30 21 826.)

11:30:58 22 Q. Take a look at this document,
11:31:00 23 Ms. DeMario. Have you seen this before?

11:31:07 24 A. I may have. I need to look
11:31:10 25 through it to refresh my recollection better.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 120

1 MARIANNE DeMARIO

11:31:15 2 Do you want me to do that?

11:31:16 3 Q. Feel free, but I'm interested --

11:31:18 4 I'll direct you to the discussion beginning on

11:31:24 5 page 5, Project Mulberry. I have a few

11:31:28 6 questions to ask you about top of page 7. Feel

11:31:31 7 free to familiarize yourself with them.

11:31:57 8 Just let me know when you're

11:31:59 9 ready.

11:32:05 10 A. This is about two pages that I

11:32:06 11 have to read. It is going to take me a couple

11:32:08 12 of minutes.

11:32:09 13 Q. Well you can start on the middle

11:32:10 14 of page 6, the second to last paragraph where

11:32:16 15 it says "Mark Barak then took the Board through

11:32:19 16 the valuation update" through the top of the

11:32:21 17 first paragraph on page 7.

11:34:17 18 A. You wanted me to stop "at

11:34:18 19 indications of interest received" or you wanted

11:34:22 20 me to read that as well?

11:34:23 21 Q. Yes. You can stop there. That's

11:34:25 22 fine. Let me ask you a few questions.

11:34:32 23 Two-thirds down of page 6 it says "Mark Barak

11:34:35 24 then took the Board through the valuation

11:34:35 25 update."

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 121

1 MARIANNE DeMARIO

11:34:40 2 Do you see that?

11:34:41 3 A. Yes.

11:34:41 4 Q. Let me skip down to the next

11:34:44 5 sentence of the first paragraph "Mark Barak

11:34:47 6 then reviewed the likely level of cost savings

11:34:49 7 required to be generated by a private equity

11:34:52 8 bidder in order to support the indicated prices

11:34:55 9 and as an alternative possible assumptions as

11:34:57 10 to increases in revenue."

11:34:59 11 Do you see that?

11:35:00 12 A. Yes.

11:35:02 13 Q. Jump over to top of page 7 "The

11:35:05 14 Board then considered the schedule of summary

11:35:07 15 valuation parameters which had been updated

11:35:11 16 from the versions previously presented to the

11:35:13 17 Board. These assessed the company's

11:35:15 18 stand-alone value on DCF, brokers' consensus

11:35:19 19 and sum of the parts basis, as well as

11:35:22 20 potential incremental value emerging from the

11:35:25 21 implementation of strategic alternatives."

11:35:28 22 Let me draw your attention to the

11:35:30 23 last sentence "as well potential incremental

11:35:24 24 value emerging from the implementation of

11:35:26 25 strategic alternatives."

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 122

1 MARIANNE DeMARIO

11:35:39 2 Is it your opinion, Ms. DeMario,
11:35:40 3 it is an appropriate factor consider in a fair
11:35:43 4 market value determination the assessment by
11:35:47 5 the target company of potential incremental
11:35:49 6 value emerging from the implementation of
11:35:52 7 strategic alternatives from a bidder?

11:35:54 8 MR. GRAVANTE: Objection to the
11:35:58 9 form.

11:35:58 10 A. Did you ask me if it was
11:36:01 11 appropriate to consider it.

11:36:03 12 Q. I did ask you that.

11:36:05 13 MR. GRAVANTE: That was the
11:36:05 14 question.

11:36:06 15 Q. Why don't you answer that. I did
11:36:08 16 ask you that question.

11:36:08 17 A. As I previously testified I think
11:36:10 18 that all information about the financial
11:36:12 19 condition of the company, about its price, what
11:36:17 20 other people are thinking about its price, I
11:36:19 21 think all that information is something I would
11:36:22 22 consider.

11:36:28 23 Q. Would you use, as a appropriate
11:36:30 24 as a factor in your fair market value
11:36:32 25 determination of EMI the fact as stated here

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 123

1 MARIANNE DeMARIO

11:36:37 2 the EMI Board was considering the potential
11:36:39 3 incremental value emerging from the
11:36:41 4 implementation of strategic alternatives from
11:36:45 5 prospective bidders?

11:36:47 6 A. How would I use that? I don't
11:36:49 7 understand your question.

11:36:49 8 Q. Is that a factor you would use in
11:36:51 9 your fair market value determination?

11:36:57 10 A. I don't understand your question.
11:36:59 11 I don't know how I would use a statement of
11:37:01 12 fact like that.

11:37:03 13 Q. If the EMI Board was assessing
11:37:07 14 the incremental value that could be brought to
11:37:12 15 EMI for the implementation of strategic
11:37:14 16 alternatives from a bidder, is that assessment
11:37:20 17 something that you would use in your
11:37:23 18 determination of the fair market value of EMI?

11:37:25 19 MR. GRAVANTE: Objection to the
11:37:27 20 form.

11:37:27 21 A. I still don't understand your use
11:37:32 22 of the word "Use."

11:37:34 23 Q. I'm using your testimony.

11:37:38 24 MR. GRAVANTE: Objection to the
11:37:38 25 form.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 124

1 MARIANNE DeMARIO

11:37:38 2 A. I would consider it, but I
11:37:40 3 don't -- beyond that I don't know what you mean
11:37:42 4 by the word use.

11:37:43 5 Q. You have drawn distinctions in
11:37:45 6 your testimony between considering a factor and
11:37:48 7 using it in a fair market value determination;
11:37:51 8 am I wrong about that?

11:37:52 9 A. You are not.

11:37:53 10 MR. GRAVANTE: Objection to the
11:37:53 11 form.

11:37:54 12 Q. Okay. With respect to the
11:37:58 13 division that you're drawing, my focus is on
11:38:01 14 whether or not you would use, as part of your
11:38:06 15 fair market value determination, an assessment
11:38:09 16 by EMI management of the potential incremental
11:38:13 17 value emerging from the implementation of
11:38:16 18 strategic alternatives of prospective bidders?

11:38:20 19 A. The fact that EMI management is
11:38:24 20 looking at that information is not something
11:38:30 21 that would impact my determination of the fair
11:38:33 22 market value of EMI.

11:38:37 23 Q. And if the EMI management or its
11:38:40 24 advisors ascribed value to the incremental
11:38:46 25 value emerging from the implementation of

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 125

1 MARIANNE DeMARIO

11:38:49 2 strategic alternatives of prospective bidders,
11:38:52 3 it is your testimony that that is something you
11:38:53 4 would not use in your fair market value
11:38:54 5 determination?

11:38:59 6 MR. GRAVANTE: Objection to the
11:38:59 7 form.

11:38:59 8 A. I apologize, I am just not
11:39:02 9 following your question.

11:39:07 10 Q. Well you testified before, did
11:39:08 11 you not, that projections generated by the
11:39:16 12 target company would be something that you
11:39:17 13 would use in your fair market value
11:39:19 14 determination?

11:39:21 15 A. That is correct.

11:39:22 16 Q. If the target company developed
11:39:26 17 projections that included incremental value you
11:39:32 18 to the company emerging from the implementation
11:39:36 19 of strategic alternatives by an acquiring
11:39:41 20 party, is that something you would use in the
11:39:45 21 determination of fair market value of EMI?

11:39:48 22 MR. GRAVANTE: Objection to the
11:39:49 23 form.

11:39:49 24 A. If the target company developed
11:39:51 25 projections that included specific

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 126

1 MARIANNE DeMARIO

11:39:57 2 characteristics for specific plans what in this
11:40:03 3 case would be a hypothetical or maybe an actual
11:40:05 4 potential buyer, it would be inappropriate to
11:40:07 5 use those projections.

11:40:08 6 Q. Why is that?

11:40:10 7 MR. GRAVANTE: Objection to the
11:40:12 8 form. Asked and answered.

11:40:12 9 A. Because it is inappropriate to
11:40:14 10 use in determining fair market value the
11:40:19 11 specific motivations or characteristics of a
11:40:22 12 specific buyer.

11:40:26 13 Q. Okay. You can put that aside.

11:40:47 14 Let's mark as DeMario Exhibit 5, a
11:40:53 15 multipage document Bates numbered CERB
11:40:57 16 39032 through -- sorry 076.

11:41:03 17 (DeMario Exhibit 5 for
11:41:03 18 identification, Email String Dated
11:40:54 19 5/16/07, production numbers CERB 39032
11:41:31 20 through 076.)

11:41:31 21 Q. I will ask you to flip through
11:41:33 22 that document. I am going to ask a couple of
11:41:35 23 specific questions briefly, Ms. DeMario, on
11:41:38 24 page Bates numbered 038 and 049.

11:42:35 25 Have you seen this document

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 127

1 MARIANNE DeMARIO

11:42:36 2 before?

11:42:40 3 A. I didn't see the Cerberus
11:42:46 4 documents before my report. It is possible I
11:42:48 5 have seen it after.

11:42:52 6 Q. Do you understand that Cerberus
11:42:53 7 had made an indicative bid for EMI --

11:42:58 8 MR. GRAVANTE: Objection to the
11:42:59 9 form.

11:42:59 10 Q. -- in April 2007?

11:43:00 11 MR. GRAVANTE: Sorry. Objection to
11:43:02 12 form.

11:43:02 13 A. May I just finish looking at the
11:43:04 14 two pages you referred to?

11:43:05 15 Q. Sure.

11:43:37 16 A. I have the last question read
11:43:38 17 back to me, please.

11:43:46 18 (The pending question was read as
11:43:46 19 follows:

11:42:52 20 "Question: Do you understand that
11:42:53 21 Cerberus had made an indicative bid for
11:42:57 22 EMI in April 2007?")

11:43:47 23 A. It's my understanding that
11:43:55 24 Cerberus made an indication of interest.

11:44:02 25 That's my understanding.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 130

1 MARIANNE DeMARIO

11:46:14 2 restructuring plan designed to reduce operating
11:46:17 3 costs by over 100 million pounds. Cerberus
11:46:20 4 believes that additional restructuring
11:46:23 5 initiatives could be implemented to improve
11:46:25 6 cash flow. A significant amount of recording's
11:46:28 7 operating expense is controllable."

11:46:31 8 Do you see that?

11:46:31 9 A. Yes.

11:46:32 10 Q. From looking at this do you
11:46:34 11 understand Cerberus management to be
11:46:38 12 identifying certain benefits to purchasing EMI?

11:46:48 13 MR. GRAVANTE: Objection to the
11:46:50 14 form.

11:46:50 15 A. I don't understand that question.

11:46:52 16 Q. Let me ask a different question.
11:46:54 17 From reading this page do you understand these
11:46:56 18 bullets to be reflecting certain initiatives
11:47:00 19 that Cerberus management could bring to EMI
11:47:05 20 were it to take control of the company?

11:47:11 21 A. I interpret this page as some
11:47:17 22 bullet points that support a potential
11:47:22 23 investment. It also talks about initiatives
11:47:26 24 that EMI is doing already on its own.

11:47:31 25 Q. Correct. And Cerberus in the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 131

1 MARIANNE DeMARIO

11:47:34 2 second bullet, second sentence after
11:47:37 3 identifying the EMI initiatives, the deck says
11:47:43 4 "Cerberus believes that additional
11:47:45 5 restructuring initiatives could be implemented
11:47:48 6 to improve cash flow. A significant amount of
11:47:50 7 recording's operating expense is controllable."
11:47:55 8 Correct?

11:47:55 9 A. That's what it says, correct.

11:47:57 10 Q. Do you interpret that as Cerberus
11:47:59 11 management identifying potential initiatives
11:48:04 12 and cost savings that Cerberus management could
11:48:08 13 obtain potentially if it bought EMI?

11:48:13 14 A. That sounds reasonable. Yes.

11:48:21 15 Q. To the extent that Cerberus is
11:48:22 16 identifying potential cost savings in
11:48:29 17 management initiatives, those factors are ones
11:48:32 18 that you would not use, if I understand your
11:48:35 19 testimony correctly, in a fair market valuation
11:48:39 20 of EMI?

11:48:43 21 A. It's appropriate to use cost
11:48:45 22 savings and initiatives to the extent that
11:48:50 23 those cost savings would be achievable by every
11:48:56 24 buyer, hypothetical buyer.

11:48:58 25 To the extent it is the specific

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 132

1 MARIANNE DeMARIO

11:49:01 2 plan and motivation of a specific buyer, it
11:49:03 3 would be inappropriate to use them in the
11:49:07 4 determination of fair market value.

11:49:08 5 Q. So if Cerberus believed it can do
11:49:11 6 a -- withdrawn.

11:49:13 7 If Cerberus believed it could
11:49:15 8 implement unique cost savings that its
11:49:19 9 management would be responsible for, that's
11:49:24 10 something you would not use in your fair market
11:49:27 11 value determination?

11:49:29 12 A. That's correct.

11:49:33 13 MR. CARNEY: We have to change
11:49:34 14 tape.

11:49:34 15 VIDEOGRAPHER: Here now marks the
11:49:36 16 end of tape 2 of the deposition of
11:49:38 17 Ms. Marianne DeMario. The time is 11:49
11:49:42 18 a.m. We are now off the record.

11:49:48 19 (Recess taken.)

11:59:41 20 VIDEOGRAPHER: Here now marks the
12:00:02 21 beginning of tape 3 of the deposition of
12:00:04 22 Marianne DeMario. The time is 11:59 a.m.
12:00:07 23 We are back on the record.

12:00:09 24

12:00:09 25 EXAMINATION CONDUCTED BY MR. CARNEY:

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 136

1 MARIANNE DeMARIO

12:05:07 2 discarded. I look at it, I consider it.")

12:05:49 3 Q. I understood you to say you did

12:05:51 4 not say --

12:05:52 5 MR. GRAVANTE: I heard it, I didn't

12:05:53 6 see it.

12:05:54 7 A. Yes.

12:05:54 8 Q. It is fair to follow-up you would

12:05:56 9 not use that information in your fair market

12:05:58 10 value determination?

12:06:01 11 A. Yes.

12:06:04 12 Q. Do you understand that several

12:06:06 13 other private equity firms also expressed or

12:06:14 14 indicated interest in making a bid for EMI in

12:06:19 15 or around April of 2007?

12:06:21 16 A. It's my understanding that around

12:06:24 17 April, May 2007 other firms made indications of

12:06:30 18 interest.

12:06:30 19 Q. And did those firms include

12:06:34 20 Fortress and One Equity?

12:06:35 21 A. I believe so. I discussed them

12:06:37 22 in my report.

12:06:40 23 Q. Is it your understanding to say

12:06:42 24 that Fortress and One Equity indicated price

12:06:49 25 ranges at which they would potentially be

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 137

1 MARIANNE DeMARIO

12:06:52 2 interested in making a bid for EMI?

12:06:54 3 A. I would need to look at my report
12:06:56 4 to refresh my recollection.

12:07:00 5 Q. If you accept for the moment that
12:07:02 6 they did indicate specific price range at which
12:07:06 7 they would consider bids, is it your testimony
12:07:08 8 that those price ranges would also be
12:07:14 9 inappropriate for you to use in a fair market
12:07:16 10 value determination of EMI?

12:07:23 11 MR. GRAVANTE: Objection to the
12:07:24 12 form.

12:07:24 13 A. Yes. I discuss that in my report
12:07:26 14 it is not only inappropriate it would be an
12:07:28 15 indication of investment value and not the
12:07:30 16 value that a hypothetical buyer or any buyer
12:07:37 17 would receive, but also because they never
12:07:39 18 actually made bids. The same would apply to
12:07:46 19 Cerberus as well.

12:07:57 20 Q. Is it your opinion that
12:07:58 21 investment value is entirely irrelevant to a
12:08:02 22 damages calculation?

12:08:04 23 MR. GRAVANTE: Objection to the
12:08:06 24 form.

12:08:06 25 A. May I just add on to my last

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 138

1 MARIANNE DeMARIO

12:08:09 2 answer before I move on?

12:08:11 3 Q. Yes.

12:08:13 4 A. When I was going through why
12:08:17 5 those indications of interest would not be
12:08:19 6 appropriate, it would also be inappropriate
12:08:21 7 because they did not have access, necessarily,
12:08:24 8 to all of the relevant information.

12:08:35 9 May I please have the last
12:08:37 10 question read back to me.

12:08:38 11 (The pending question was read as
12:08:38 12 follows:

12:07:57 13 "Question: Is it your opinion that
12:07:58 14 investment value is entirely irrelevant to
12:08:02 15 a damages calculation?")

12:08:39 16 MR. GRAVANTE: And I objected to
12:08:40 17 the form.

12:08:41 18 A. It's my understanding that in
12:08:43 19 this case the relevant metric is the value that
12:08:49 20 Terra Firma received. So given that, as the
12:08:55 21 starting point, the appropriate standard of
12:09:00 22 value is fair market value.

12:09:03 23 If one is trying to measure the
12:09:05 24 value received, it would be inappropriate to
12:09:08 25 use investment value. That is not to say that

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 139

1 MARIANNE DeMARIO

12:09:14 2 legally it would be impossible for an
12:09:17 3 investment value to be appropriate. That's
12:09:20 4 really a legal question.

12:09:21 5 Q. Why, in your view, is it
12:09:23 6 inappropriate to use investment value as a
12:09:26 7 measure of value received by Terra Firma?

12:09:30 8 MR. GRAVANTE: Objection to the
12:09:31 9 form.

12:09:31 10 A. Because by its definition the
12:09:34 11 investment value includes both the value that
12:09:40 12 the buyer would receive, plus the value that
12:09:43 13 the buyer is bringing to the table.

12:09:51 14 Q. The value that a buyer is
12:09:55 15 bringing to the table, however, is a component
12:09:59 16 or a basis of the purchase price at which the
12:10:03 17 buyer is -- at which the buyer is willing to
12:10:11 18 acquire EMI; isn't that correct?

12:10:13 19 A. I don't understand that question.

12:10:19 20 Q. Is a buyer's purchase price for a
12:10:25 21 company predicated in any way on what it sees
12:10:27 22 as the investment value of the acquisition?

12:10:33 23 MR. GRAVANTE: Objection to the
12:10:34 24 form.

12:10:34 25 A. It is possible that a buyer is

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 140

1 MARIANNE DeMARIO

12:10:38 2 willing to pay part of the value that it brings
12:10:43 3 to the table in order to acquire a company.
12:10:53 4 But that does not mean that the price it is
12:10:56 5 willing to pay equates to the fair market
12:11:00 6 value. Fair market value does not change.

12:11:09 7 Q. If the buyer acquires a target
12:11:12 8 company and makes various operational and
12:11:20 9 financial improvements to the company, do those
12:11:29 10 improvements factor into the value of the
12:11:31 11 company acquired?

12:11:33 12 MR. GRAVANTE: Objection to the
12:11:33 13 form. We're talking about fair market or
12:11:37 14 investment?

12:11:37 15 MR. CARNEY: I just said value.

12:11:39 16 MR. GRAVANTE: Value.

12:11:39 17 A. They would factor into the
12:11:41 18 investment value of the company. The specific
12:11:45 19 plans of the buyer do not factor into the fair
12:11:50 20 market value.

12:11:50 21 Q. And that is because --

12:11:52 22 A. Only the plans that one could
12:11:55 23 reasonably expect any buyer would make.

12:12:00 24 Q. And that is because you don't
12:12:01 25 assign those operational -- withdrawn.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 141

1 MARIANNE DeMARIO

12:12:05 2 That's because in a fair market
12:12:08 3 value determination you do not assign the value
12:12:12 4 achieved through operational and financial
12:12:15 5 initiatives as part of the value received by
12:12:21 6 the buyer?

12:12:22 7 MR. GRAVANTE: Objection to the
12:12:28 8 form.

12:12:28 9 A. Those additional initiatives as
12:12:33 10 you describe them, what I describe as the
12:12:35 11 specific characteristics or motivations of a
12:12:37 12 specific buyer, you know, really relate to a
12:12:42 13 hypothetical company, a company that will only
12:12:45 14 come into existence after the purchase.

12:12:50 15 So it does not, it's not relevant
12:12:52 16 to the value that the buyer receives at the
12:12:58 17 date and at the exact time that it's purchased.

12:13:01 18 Q. But if the acquiring party
12:13:05 19 implements managerial and financial initiatives
12:13:08 20 that increases the value of the target company,
12:13:16 21 doesn't the increase in value become part of
12:13:21 22 the value received by the acquiring company?

12:13:25 23 MR. GRAVANTE: Objection to the
12:13:25 24 form.

12:13:27 25 A. No. It's the value that the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 142

1 MARIANNE DeMARIO

12:13:31 2 acquiring company brings after it receives the
12:13:38 3 value of the company on a stand-alone basis.

12:13:44 4 Q. Those initiatives will take place
12:13:46 5 after the acquisition. So is it your testimony
12:13:49 6 that --

12:13:50 7 A. Can I finish my answer?

12:13:52 8 Q. Okay. I'm just trying to
12:13:53 9 understand it. So finish your answer.

12:14:05 10 A. Can I have my answer read back.

12:14:31 11 (The preceding answer was read as
12:14:31 12 follows:

12:13:27 13 "Answer: No. It's the value
12:13:29 14 that the acquiring company brings after it
12:13:36 15 receives the value of the company on a
12:13:40 16 stand-alone basis.")

12:14:32 17 A. That's what I said. So the value
12:14:33 18 of the company on a stand-alone basis is the
12:14:35 19 value that every buyer would receive. So let's
12:14:37 20 say the value is 100, the value after this
12:14:43 21 potential transaction might be 110 to buyer A
12:14:49 22 and might be 120 to buyer B, and it might be
12:14:53 23 100 to buyer C. But the value that the buyer
12:14:57 24 receives does not change.

12:15:08 25 Q. That's regardless of any increase

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 143

1 MARIANNE DeMARIO

12:15:10 2 in value that the acquiring company can bring
12:15:14 3 to the target company?

12:15:15 4 MR. GRAVANTE: Objection to the
12:15:15 5 form. Asked and answered.

12:15:17 6 A. If that increase is specific and
12:15:21 7 unique to that specific buyer.

12:15:23 8 Q. Correct. Your answer is?

12:15:27 9 A. If -- yes, if what I just said is
12:15:31 10 true, then correct.

12:15:43 11 Q. Is it your opinion --

12:15:46 12 MR. GRAVANTE: Can you just give me
12:15:48 13 one second.

12:15:49 14 MR. CARNEY: Of course.

12:16:13 15 MR. GRAVANTE: Okay. Thank you.

12:16:14 16 MR. CARNEY: Let's mark this as
12:16:15 17 DeMario 6 the Expert Report of Daniel R.
12:16:19 18 Fischel.

12:16:19 19 (DeMario Exhibit 6 for
12:16:17 20 identification, Expert Report of Daniel R.
12:16:19 21 Fischel, no production numbers.)

12:17:01 22 Q. Have you seen that document
12:17:03 23 before?

12:17:03 24 A. This appears to be a copy of
12:17:07 25 Dr. Fischel's Expert Report. And yes, I have

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 144

1 MARIANNE DeMARIO

12:17:09 2 seen it before.

12:17:12 3 Q. You read that report before?

12:17:13 4 A. Yes.

12:17:21 5 Q. If you turn to page 28 of
12:17:23 6 Dr. Fischel's report. I will ask you to --
12:17:33 7 well, let me refer your attention to the middle
12:17:35 8 of the page and the following portion of
12:17:39 9 Dr. Fischel's report.

12:17:41 10 He writes "At the time of the
12:17:42 11 acquisition market participants understood that
12:17:45 12 EMI was evaluating strategic alternatives,
12:17:48 13 including the potential sale of the company
12:17:50 14 because EMI and market participants believe
12:17:53 15 that a transaction would be value enhancing.

12:17:55 16 "The fair market value of EMI
12:17:57 17 includes the benefits that EMI, Terra Firma,
12:18:00 18 and market participants believed would accrue
12:18:03 19 from a value enhancing strategic alternative
12:18:05 20 because such an alternative increased the
12:18:07 21 amount that a willing buyer and a willing
12:18:10 22 seller would have agreed upon in a hypothetical
12:18:12 23 transaction."

12:18:14 24 There is a footnote. Do you
12:18:15 25 agree with Dr. Fischel's statement in that

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 163

1 MARIANNE DeMARIO

12:43:35 2 have changed its bid had it known about these
12:43:41 3 facts?

12:43:42 4 A. About which facts?

12:43:47 5 Q. The inflated EBITDA.

12:43:50 6 A. I have not seen specific
12:43:53 7 documents that I can recall.

12:44:15 8 Q. Are you aware that in or around
12:44:20 9 2007 Warner Music Group made -- expressed
12:44:23 10 interest in bidding for EMI at a price of 2.60
12:44:26 11 pounds?

12:44:30 12 A. Yes.

12:44:32 13 Q. Is that fact a fact that you
12:44:35 14 would find appropriate to use in a fair market
12:44:41 15 value determination for EMI?

12:44:44 16 A. Again, it is something that I
12:44:46 17 would consider. I do not believe it's
12:44:49 18 appropriate to use that as the fair market
12:44:59 19 value.

12:44:59 20 Q. Why is that?

12:45:05 21 A. First, it didn't happen. Second,
12:45:10 22 it would reflect, to a certain extent, the
12:45:16 23 specific synergies of Warner.

12:45:22 24 Third, it includes information
12:45:27 25 where the bid would be based upon -- the bid

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 164

1 MARIANNE DeMARIO

12:45:30 2 would not reflect relevant information. The

12:45:35 3 bid did not reflect relevant information. The

12:45:40 4 bid happened in -- I guess it wasn't actually a

12:45:44 5 bid, it was probably an indication of interest.

12:45:47 6 The indication of interest

12:45:50 7 happened at a time two months prior to May

12:45:54 8 2007. And there may be other reasons as well.

12:46:00 9 Q. Why does the fact it came two

12:46:02 10 months prior to May 2007 matter for your

12:46:04 11 analysis?

12:46:07 12 A. I was listing a number of

12:46:11 13 reasons. And it's --

12:46:12 14 Q. But the temporal aspect of the

12:46:14 15 bid, that's what I'm asking about.

12:46:16 16 A. This was a market that was -- an

12:46:20 17 industry that was declining. So it is

12:46:25 18 certainly possible that the value had declined

12:46:30 19 in that two-month period. It is something that

12:46:32 20 I would have to look at.

12:46:40 21 Q. Do you understand that the EMI

12:46:45 22 Board had determined that it would entertain

12:46:51 23 bids of prices at 2.60 pounds and above for the

12:46:56 24 sale of EMI?

12:46:59 25 A. That sounds reasonable. I don't

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 165

1 MARIANNE DeMARIO

12:47:02 2 recall that specific language. But it sounds
12:47:05 3 reasonable.

12:47:06 4 Q. Would that fact be one that would
12:47:11 5 be appropriate for you to use in the fair
12:47:16 6 market value determination of EMI?

12:47:22 7 A. Again it would be something that
12:47:23 8 I would consider. But I don't believe that
12:47:26 9 that is appropriate or it represents the value,
12:47:33 10 the fair market value of EMI.

12:47:34 11 Q. Why would it be inappropriate for
12:47:37 12 you to use a floor price, if you will,
12:47:43 13 established by the target company in your fair
12:47:48 14 market value determination?

12:47:50 15 MR. GRAVANTE: Objection to the
12:47:52 16 form.

12:47:52 17 A. Because their goal is to maximize
12:47:56 18 the amount of money that they receive from the
12:47:58 19 transaction. Their goal is not to determine
12:48:02 20 the fair market value of the company.

12:48:06 21 So if they've successfully hid
12:48:09 22 from the world the fact that they were about to
12:48:12 23 violate their debt covenants and were in severe
12:48:16 24 financial difficulties, I would not expect them
12:48:19 25 to be figuring that into what the fair market

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 166

1 MARIANNE DeMARIO

12:48:30 2 value of their company was for example.

12:48:40 3 Q. You mentioned EMI withholding
12:48:41 4 information about the failure of an impending
12:48:46 5 debt covenant. What basis do you have for your
12:48:48 6 testimony that EMI was about to violate their
12:48:58 7 debt covenants?

12:49:00 8 A. My understanding is that they
12:49:05 9 technically either did actually violate their
12:49:08 10 debt covenants and received a waiver to include
12:49:11 11 the Bertelsmann settlement or about to and
12:49:16 12 received that waiver. I don't remember the
12:49:17 13 exact timing.

12:49:18 14 Q. So, your testimony concerns the
12:49:21 15 Bertelsmann settlement?

12:49:23 16 A. That's one of the pieces. But
12:49:25 17 the, in general if you're that close to
12:49:30 18 violating your debt covenants, that's an
12:49:33 19 indication of the financial difficulties.

12:49:38 20 Q. And it's your understanding that
12:49:42 21 EMI withheld that information from Terra Firma
12:49:45 22 and other prospective bidders?

12:49:46 23 A. If I use the word withheld, that
12:49:49 24 may have been -- I may have misspoke. It was
12:49:54 25 information that was not available. The term

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 167

1 MARIANNE DeMARIO

12:49:56 2 withheld implies some forethought. It was
12:50:03 3 information that was not available. It was
12:50:05 4 known to EMI, it was not available to the other
12:50:07 5 market participants.

12:50:11 6 Q. Have you seen any documents that
12:50:13 7 support the conclusion that Terra Firma would
12:50:14 8 have acted any differently had it seen the
12:50:18 9 information with respect to EMI's debt
12:50:20 10 covenants you were just testifying to?

12:50:22 11 MR. GRAVANTE: Objection to the
12:50:22 12 form.

12:50:22 13 A. Can I have that question read
12:50:37 14 back.

12:50:37 15 (The pending question was read as
12:50:37 16 follows:

12:50:11 17 "Question: Have you seen any
12:50:12 18 documents that support the conclusion that
12:50:14 19 Terra Firma would have acted any
12:50:15 20 differently had it seen the information
12:50:18 21 with respect to EMI's debt covenants you
12:50:21 22 were just testifying to?")

12:50:38 23 A. I can't recall seeing documents
12:50:42 24 like that. But that does not mean they don't
12:50:49 25 exist.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 168

1 MARIANNE DeMARIO

12:50:52 2 Q. But the basis for your
12:50:54 3 understanding that that was information that
12:50:57 4 Terra Firma believed it should have had came
12:51:01 5 from your discussions with counsel and others
12:51:05 6 that you testified to before?

12:51:11 7 A. As I previously testified, my
12:51:13 8 understanding came from my review of the
12:51:15 9 Complaint, discussions with counsel,
12:51:22 10 discussions with Michael Slattery. And again
12:51:24 11 there may be other documents I reviewed as
12:51:26 12 well.

12:51:26 13 Q. But you can't recall what those
12:51:27 14 documents are as you sit here now?

12:51:29 15 A. That's correct.

12:51:47 16 Q. Do you have an understanding,
12:51:48 17 Ms. DeMario, that in the time period after the
12:51:55 18 bid on May 21 and through June and portions of
12:51:59 19 July, shares of EMI in the market traded at
12:52:08 20 prices above 2.65 pounds?

12:52:14 21 A. That's my understanding.

12:52:18 22 Q. Is it a reasonable conclusion to
12:52:20 23 draw from that that the market expected there
12:52:30 24 to be a topping bid above the 2.65 pounds that
12:52:34 25 Terra Firma had made for EMI?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 169

1 MARIANNE DeMARIO

12:52:36 2 MR. GRAVANTE: Objection to the
12:52:42 3 form.

12:52:42 4 A. I think it is reasonable to
12:52:44 5 assume there was some speculation. I don't
12:52:46 6 think it is reasonable to assume that's what
12:52:47 7 the market expected. There is a difference. I
12:52:52 8 will just say I put quotes around the market.

12:52:55 9 Q. That's fair. But to the extent
12:52:58 10 there was some speculation about potential
12:53:01 11 topping bids above 2.65 pounds, the fact
12:53:06 12 remains that for portions of that period in
12:53:09 13 May, June and July, the share price for EMI was
12:53:12 14 trading at levels above 2.65 pounds?

12:53:16 15 A. I believe and I think that
12:53:20 16 Fischel has a chart in his report that it went
12:53:22 17 up and down. So there clearly was speculation
12:53:25 18 and belief in the market that the transaction
12:53:28 19 wouldn't happen at all.

12:53:30 20 So, I think it goes both ways.

12:53:32 21 Q. Right.

12:53:33 22 A. But we can look at that chart.

12:53:38 23 Q. Feel free to, it is Fischel
12:53:40 24 Exhibit C if you would like to look at it
12:53:42 25 quickly just to confirm that.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 202

1 MARIANNE DeMARIO

14:17:52 2 Q. Did you become aware of them once
14:17:54 3 you read the Fischel report and Exhibit K?

14:17:57 4 A. Yes.

14:17:58 5 Q. Did you ask your staff or counsel
14:18:00 6 to obtain these documents that are referenced
14:18:03 7 here for you?

14:18:09 8 A. Yes.

14:18:09 9 Q. Did you review those documents?

14:18:15 10 A. Yes. Well if we are talking
14:18:16 11 about all of Exhibit K, I didn't ask anybody to
14:18:19 12 get me the information about their stock prices
14:18:21 13 down at the bottom but as far as the Citigroup
14:18:28 14 Terra, Project Dice, the Citigroup Cerberus and
14:18:31 15 Merrill Lynch Cerberus I asked to look at
14:18:33 16 those.

14:18:40 17 Q. Having reviewed the documents,
14:18:41 18 did any of the documents cause you to want to
14:18:43 19 change the conclusions that you reached in your
14:18:49 20 report?

14:18:49 21 A. No.

14:18:55 22 Q. Take a look just quickly at the
14:18:57 23 document's reference. If you look at Fischel
14:19:00 24 K, the first entry is Greenhill Project
14:19:03 25 Mulberry May 21 valuation.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 203

1 MARIANNE DeMARIO

14:19:05 2 Then if you pull out that May 21
14:19:08 3 valuation we were just looking at, which is
14:19:15 4 Exhibit 7, I guess we talked about the take
14:19:19 5 out. If you go back to page 5. We discussed a
14:19:35 6 few minutes ago the take out valuations
14:19:37 7 reflected at the bottom of that chart. Do you
14:19:43 8 recall that?

14:19:43 9 A. Yes.

14:19:47 10 Q. Do you understand those entries
14:19:50 11 correspond to what Dr. Fischel had reflected in
14:19:56 12 Exhibit K?

14:19:58 13 A. Let me just check the numbers.

14:20:04 14 Q. Under that first entry for
14:20:06 15 Greenhill Project Mulberry.

14:20:30 16 A. One of them where it says sales
14:20:31 17 of music publishing in Japan recorded music
14:20:34 18 there is a range of 181 to 237. Then there is
14:20:41 19 a dotted line goes to 293. Fischel's report
14:20:44 20 goes to 293, but I can't quickly see what the
14:20:47 21 difference is here.

14:20:47 22 Q. Right.

14:20:48 23 A. I don't know if it is appropriate
14:20:49 24 for it to go up to 293 or to go up to 237.

14:20:53 25 Q. That's fair. And indeed the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 204

1 MARIANNE DeMARIO

14:20:56 2 Greenhill valuation does reflect the dotted
14:21:00 3 line that shows a rectangle between the 237
14:21:04 4 range and 293 range. But with that exception,
14:21:07 5 does it appear that this first batch of entries
14:21:11 6 under Fischel K are drawn from the take out
14:21:14 7 valuation ranges in the Greenhill report?

14:21:17 8 A. Yes.

14:21:20 9 Q. Let's skip down to the next one
14:21:22 10 Citigroup/Terra Project Dice May 17, 2007.

14:21:32 11 Let's mark as DeMario 9 a
14:21:39 12 document entitled Project Dice Credit Approval
14:21:41 13 Memorandum May 17, 2007. It says Bates
14:21:48 14 Citi-TF-00562437 through 530.

14:21:55 15 (DeMario Exhibit 9 for
14:21:40 16 identification, Project Dice Credit
14:21:41 17 Approval Memorandum May 17, 2007,
14:21:45 18 production numbers Citi-TF-00562437
14:21:52 19 through 530.)

14:22:30 20 Q. Have you seen that document
14:22:31 21 before?

14:22:33 22 A. I don't recall if I've is seen
14:22:34 23 the entire document or my staff just showed me
14:22:36 24 certain pages.

14:22:37 25 Q. Okay.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 205

1 MARIANNE DeMARIO

14:22:38 2 A. I don't recall looking at
14:22:42 3 something that was this thick.

14:22:43 4 Q. Do you have an understanding of
14:22:44 5 what the document is?

14:22:55 6 A. Can you just give me a second
14:22:57 7 since I don't remember looking at a document of
14:22:59 8 this size.

14:23:00 9 Q. Sure.

14:24:04 10 A. The document states its purpose
14:24:05 11 is to request approval to issue a financing
14:24:07 12 commitment to support Terra Firma in its
14:24:10 13 proposed acquisition much EMI.

14:24:14 14 Q. Will you accept my --

14:24:15 15 A. I haven't had a chance to review
14:24:17 16 the document --

14:24:17 17 Q. Of course, I understand.

14:24:19 18 A. -- if it has any other purpose.

14:24:22 19 Q. Will you accept my representation
14:24:24 20 this is an internal Citibank Credit approval
14:24:28 21 memorandum with respect to the proposed
14:24:30 22 financing by Terra Firma for the EMI
14:24:31 23 acquisition?

14:24:32 24 A. Okay.

14:24:38 25 Q. Okay. Let's turn if we can to

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 206

1 MARIANNE DeMARIO

14:24:41 2 2509 on the bottom.

14:25:04 3 A. Okay.

14:25:05 4 Q. It says valuation back up on the
14:25:09 5 top of that page. Do you see that?

14:25:11 6 A. Yes.

14:25:13 7 Q. There is a chart with four
14:25:14 8 entries for WMG trading, SOTP precedents, DCF
14:25:21 9 and research target prices. Do you see that?
14:25:23 10 Actually there is a fifth entry called 52 week
14:25:26 11 trading.

14:25:27 12 A. Yes.

14:25:34 13 Q. If you turn back to Fischel K
14:25:36 14 under the Citigroup Terra Project Dice entry
14:25:39 15 there are four entries for WMG trading
14:25:41 16 multiple, SOTP precedents, DCF, Terra Firma
14:25:46 17 case DCF downside case and research target
14:25:54 18 prices. Do you see that?

14:25:55 19 A. Yes.

14:25:56 20 Q. Did you have --

14:25:58 21 A. Can I just have a minute to --

14:26:02 22 Q. Sure.

14:26:02 23 A. -- to check and see exactly where
14:26:05 24 the numbers come from.

14:26:06 25 Q. It will be apparent while you're

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 207

1 MARIANNE DeMARIO

14:26:08 2 looking I'll represent to you per footnote 2 of
14:26:16 3 the Fischel exhibit, there is a calculation
14:26:20 4 that one must undertake to get to the numbers
14:26:23 5 that he reflects on the front page of this
14:26:27 6 chart.

14:27:10 7 A. The section we're in is called
14:27:11 8 valuation backup. Is there a place where they
14:27:14 9 summarize the valuation earlier in this memo?

14:27:17 10 Q. I don't know that they did.

14:27:19 11 A. It is just a little confusing to
14:27:21 12 go from the page you're having me look at to
14:27:26 13 the Fischel report.

14:27:27 14 Q. Understand. I won't ask you to
14:27:28 15 go through the arithmetic.

14:27:31 16 Do you have any reason to believe
14:27:32 17 that the calculations reflected in footnote 2
14:27:43 18 are accurate and are derived from this page
14:27:46 19 2509 in the Citi report?

14:27:48 20 MR. GRAVANTE: Objection to form.

14:27:50 21 A. I would have to say that it's not
14:27:53 22 simple mathematics. So while I have no reason
14:27:56 23 to believe they are not true, I have no reason
14:27:58 24 to believe that they're accurate or the way I
14:28:01 25 would do it, the way I would perform them.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 208

1 MARIANNE DeMARIO

14:28:05 2 Q. Okay. Why don't you put that
14:28:06 3 document aside for now. Let's go to Citigroup,
14:28:09 4 the next entry on Fischel Exhibit K, is
14:28:13 5 Citigroup Cerberus Project Earl, May 18, 2007.
14:28:25 6 Let's mark that.

14:28:26 7 This is going to be DeMario
14:28:28 8 Exhibit 10. Multipage document
14:28:34 9 CITI-TF-00326373 through 438.

14:28:34 10 (DeMario Exhibit 10 for
14:28:34 11 identification, Leveraged Finance
14:28:16 12 Memorandum May 18, 2007, production
14:28:30 13 numbers CITI-TF-00326373 through 438.)

14:29:19 14 Q. Have you seen this document
14:29:20 15 before?

14:29:20 16 A. Again, I may have seen pages, I
14:29:22 17 don't recall seeing the entirety of this
14:29:23 18 document.

14:29:37 19 Q. Again, if you look at the first
14:29:40 20 page, Citigroup letterhead called Leveraged
14:29:43 21 Finance Memorandum. Top right-hand corner says
14:29:46 22 Project Earl Final Approval Memorandum.

14:29:51 23 Will you accept my
14:29:52 24 representation, Ms. DeMario, that this is an
14:29:57 25 internal Citigroup memorandum that addresses a

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 209

1 MARIANNE DeMARIO

14:29:59 2 financing proposal to finance a potential bid
14:30:03 3 by Cerberus for EMI?

14:30:09 4 A. I will accept that
14:30:10 5 representation, but depending upon your
14:30:11 6 question I may want more time to review it
14:30:16 7 before I answer your question.

14:30:17 8 Q. Understood. Can you turn for me
14:30:18 9 to Bates number 6427 in that document, the page
14:30:52 10 of that document is entitled Discounted Cash
14:30:56 11 Flow Analysis Base Case Exhibit 3.

14:30:58 12 If you look on the bottom right
14:30:59 13 Hands chart there is a chart that says equity
14:31:03 14 value as of 9/30/07.

14:31:07 15 If you look right in the middle
14:31:09 16 of the boxed data there is a number 2,592. Do
14:31:16 17 you see that?

14:31:16 18 A. I see the number, but I have no
14:31:19 19 context whatsoever as to what this page is
14:31:25 20 purporting to represent or what that number is
14:31:26 21 purporting to represent.

14:31:28 22 Q. Okay. If you turn back to
14:31:29 23 Exhibit K of Fischel the entry next to
14:31:36 24 Citigroup Cerberus price per share have 283,
14:31:43 25 and equity value of 2,592. Do you see that?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 210

1 MARIANNE DeMARIO

14:31:47 2 A. Yes, I see that.

14:31:50 3 Q. Any reason to doubt that number
14:31:51 4 is not derived from page 6427 of Project Earl?

14:31:58 5 A. It may be derived from it, but
14:32:01 6 without understanding the context and without
14:32:03 7 looking at this document with some more detail,
14:32:08 8 I can't tell you whether or not it's
14:32:11 9 appropriate to call that a value, whether or
14:32:13 10 not there is many other values in here that
14:32:16 11 aren't included in Exhibit K.

14:32:23 12 Q. But you did not consider this
14:32:24 13 document when you were preparing your report;
14:32:31 14 correct?

14:32:31 15 A. I did not because I didn't have
14:32:32 16 access to this document when I prepared my
14:32:34 17 report.

14:32:36 18 Q. The same is true for the Project
14:32:38 19 Dice memorandum we just looked at with respect
14:32:40 20 to Terra Firma's bid, you did not consider that
14:32:44 21 document when you were preparing your report
14:32:48 22 because you had not seen it?

14:32:50 23 A. That's correct.

14:32:53 24 Q. Why don't you put that aside.

14:32:54 25 Let's just mark this last document that Fischel

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 211

1 MARIANNE DeMARIO

14:32:57 2 refers to here. You will see the next entry is
14:33:00 3 Merrill Lynch Cerberus Project Record May 17,
14:33:04 4 2007.

14:33:08 5 Let's mark as DeMario Exhibit 11
14:33:14 6 a multipage document Bates numbered
14:33:18 7 LAZ _TF _0011970 through 990.

14:33:26 8 (DeMario Exhibit 11 for
14:33:01 9 identification, Cerberus Project Record
14:33:03 10 May 17, 2007, production numbers LAZ_TF
14:33:22 11 _0011970 through 990.)

14:34:11 12 Q. Have you seen this document
14:34:12 13 before?

14:34:12 14 A. Yes.

14:34:16 15 Q. When did you first see this
14:34:17 16 document?

14:34:23 17 A. Probably shortly after I looked
14:34:24 18 at the Fischel report.

14:34:27 19 Q. Was this one of the Cerberus
14:34:28 20 documents that you looked at that you testified
14:34:29 21 to before?

14:34:34 22 A. Yes.

14:34:34 23 Q. If you turn to --

14:34:36 24 A. Can I just have a minute to look
14:34:38 25 through it, please.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 212

1 MARIANNE DeMARIO

14:34:39 2 Q. Of course.

14:36:22 3 A. Okay.

14:36:24 4 Q. If you turn to page 975, please.

14:36:31 5 A. Okay.

14:36:34 6 Q. There is page with a heading

14:36:37 7 Valuation Considerations Valuation Summary, do
14:36:41 8 you see that?

14:36:41 9 A. Yes, I do.

14:36:45 10 Q. Beginning with the second entry
14:36:47 11 under the column methodology there is an entry
14:36:49 12 labeled Brokers' Research. Do you see that?

14:36:53 13 A. Yes.

14:36:53 14 Q. Then there are a number of other
14:36:54 15 entries under that. If you look at those
14:36:58 16 entries beginning with the entry for brokers'
14:37:01 17 research down through UK Take Over Premium,
14:37:06 18 does it appear that those figures are reflected
14:37:13 19 in Fischel Exhibit K under the Merrill Lynch
14:37:19 20 Cerberus entry?

14:38:07 21 A. I'm sorry, what was the question?

14:38:09 22 Q. Whether having reviewed page 975,
14:38:13 23 whether it appears that the entries to which I
14:38:15 24 referred are reflected in Fischel Exhibit K
14:38:21 25 under the heading Merrill Lynch Cerberus

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 213

1 MARIANNE DeMARIO

14:38:23 2 Project Record?

14:38:26 3 A. Yes, they are.

14:38:28 4 Q. And then just to finish out this
14:38:30 5 Exhibit K, Dr. Fischel has a series of EMI
14:38:40 6 closing price figures at the bottom of this
14:38:43 7 exhibit; do you see that?

14:38:44 8 A. Yes.

14:38:46 9 Q. Looking at this exhibit, with the
14:38:47 10 exception of one entry which is the trading
14:38:51 11 comparable consensus base case under the
14:38:54 12 Merrill Lynch Cerberus Project Record section,
14:38:59 13 all of these valuation indicators, are they
14:39:02 14 not, are greater than the fair market values
14:39:06 15 you identify in your tables 1A and 11B?

14:39:10 16 MR. GRAVANTE: Objection to the
14:39:11 17 form.

14:39:11 18 A. Would you like me to answer
14:39:13 19 simply as a matter of math?

14:39:15 20 Q. Yes.

14:39:15 21 A. Okay. Simply as a matter of math
14:39:18 22 the numbers on Fischel Exhibit K, but for the
14:39:25 23 trading comparables consensus base case, which
14:39:29 24 is lower than my May 2007 conclusion of fair
14:39:35 25 market value simply as a matter of math these

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 214

1 MARIANNE DeMARIO

14:39:37 2 mid points are higher than my conclusion of the
14:39:44 3 fair market value in May of 2007, in August
14:39:48 4 2007.

14:39:49 5 Q. Is it your opinion that none of
14:39:51 6 the valuation indicators reflected on Fischel
14:39:54 7 Exhibit K are appropriate to be used in a fair
14:40:01 8 market valuation determination for EMI?

14:40:02 9 MR. GRAVANTE: Objection to the
14:40:06 10 form.

14:40:06 11 A. Well, I think that some of them
14:40:10 12 were prepared in a fashion similar to the way
14:40:14 13 that I calculated the fair market value.

14:40:19 14 So I would not be able to dismiss
14:40:23 15 them all as being inappropriate. The ones that
14:40:25 16 were calculated from Cerberus' point of view
14:40:29 17 and the ones that were calculated assuming
14:40:35 18 specific strategic initiatives, as I've
14:40:40 19 previously testified, are inappropriate.

14:40:44 20 But, again, to the extent that
14:40:51 21 Merrill Lynch was not in possession of all the
14:40:54 22 relevant information, that is another factor
14:40:57 23 that would need to be taken into consideration
14:41:00 24 when looking at the appropriateness or the
14:41:04 25 accuracy of these numbers.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 215

1 MARIANNE DeMARIO

14:41:09 2 Q. In your last answer you stated "I
14:41:12 3 think that some were prepared in a fashion
14:41:15 4 similar to the way I calculated the fair market
14:41:18 5 value, so I would not be able to dismiss them
14:41:20 6 all as being inappropriate."

14:41:24 7 Can you identify the entries for
14:41:25 8 me that you could not dismiss as being
14:41:30 9 inappropriate?

14:41:38 10 A. I certainly don't have access to
14:41:40 11 sufficient information to determine whether or
14:41:44 12 not I agree with all of the information, all of
14:41:51 13 the assumptions.

14:41:52 14 But if you look at DeMario
14:41:54 15 Exhibit 11975, the trading comparable consensus
14:42:03 16 base case and the DCF perpetuity growth, I
14:42:15 17 think Fischel calls it -- he doesn't call it
14:42:18 18 anything, but the base case, not the Cerberus
14:42:21 19 case, my interpretation of those two lines is
14:42:25 20 that one is a market multiple analysis that
14:42:29 21 doesn't include buyer-specific synergies or
14:42:36 22 values.

14:42:36 23 And the other one is a DCF that
14:42:39 24 similarly would not include buyer specific
14:42:42 25 value. To the extent that my assumption is

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 216

1 MARIANNE DeMARIO

14:42:46 2 wrong, I would change my answer, but that's how
14:42:49 3 I am interpreting those two lines.

14:43:09 4 Q. Switching gears a little bit.
14:43:10 5 Now you identify two different methods for
14:43:23 6 calculating a fair market value in your report,
14:43:26 7 the income method and the market comparable
14:43:30 8 method; is that correct?

14:43:32 9 A. I identify three different
14:43:34 10 methods.

14:43:35 11 Q. There was a third. What's the
14:43:38 12 third?

14:43:38 13 A. The asset approach.

14:43:40 14 Q. And is it fair to say that you
14:43:46 15 concluded that the asset approach was not an
14:43:48 16 appropriate approach for this exercise?

14:43:50 17 A. That's correct.

14:43:51 18 Q. Why?

14:43:52 19 A. The asset looks at the underlying
14:43:57 20 physical assets typically. This would be very
14:44:00 21 unusual for the asset approach to be
14:44:08 22 appropriate when valuing an ongoing business
14:44:10 23 that had intangible assets.

14:44:13 24 Q. The asset approach is not used
14:44:16 25 for valuation where the company has significant

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 217

1 MARIANNE DeMARIO

14:44:18 2 intangible assets?

14:44:19 3 A. It could be. I'm saying it's
14:44:21 4 unusual to use the asset approach when a
14:44:26 5 business is ongoing.

14:44:28 6 Q. And for that reason you chose not
14:44:30 7 to use the asset approach?

14:44:31 8 A. That's correct.

14:44:33 9 Q. So you used the income approach
14:44:36 10 and the market approach; correct?

14:44:38 11 A. That's correct.

14:44:39 12 Q. Okay. Can you explain what the
14:44:41 13 income method is that you utilized, just
14:44:43 14 generally?

14:44:44 15 A. The income method you look at the
14:44:48 16 expected future cash flows. And you discount
14:44:52 17 those future cash flows into current terms
14:44:55 18 based on the risk related to those cash flows.

14:45:03 19 Q. Is DCF sometimes referred to as
14:45:06 20 discounted cash flow -- withdrawn.

14:45:09 21 Is DCF a reference to discounted
14:45:11 22 cash flow?

14:45:12 23 A. DCF method stands for discounted
14:45:14 24 cash flow method.

14:45:15 25 Q. Is that the same as the income

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 218

1 MARIANNE DeMARIO

14:45:16 2 method?

14:45:18 3 A. I would use the terms
14:45:20 4 interchangeably.

14:45:29 5 Q. Let's turn to paragraph 57 of
14:45:31 6 your report actually jumping back to paragraph
14:45:58 7 56, you said "to begin my since," this is your
14:45:59 8 income approach. "To begin my analysis I
14:46:02 9 evaluate projections available approximate to
14:46:05 10 each valuation date that were prepared by EMI."

14:46:08 11 Then paragraph 57 you say "On
14:46:10 12 March 1, 2007 EMI issued a draft 5 year plan
14:46:13 13 that consisted of separate projections for EMI
14:46:17 14 RM and EMI MP for years 2008-2012."

14:46:21 15 Do you see that?

14:46:22 16 A. Yes, I do.

14:46:23 17 Q. Does RM refer to recorded music?

14:46:27 18 A. Yes, it does.

14:46:27 19 Q. MP to music publishing?

14:46:29 20 A. Yes.

14:46:32 21 Q. Paragraph 58 you go on to say
14:46:34 22 "2007 projections are summarized in Exhibits
14:46:38 23 B-1 and B-2" of your report; is that correct?

14:46:41 24 A. Yes.

14:46:56 25 MR. CARNEY: Let's mark as DeMario

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 219

1 MARIANNE DeMARIO

14:46:58 2 12 a multipage document Bates

14:47:00 3 TF 0000367046 through 055.

14:47:07 4 (DeMario Exhibit 12 for

14:47:07 5 identification, EMI Group Draft

14:47:07 6 Operational Model 3/1/07, production

14:47:00 7 numbers TF 0000367046 through 055.)

14:47:37 8 Q. Do you recognize this document?

14:47:39 9 A. I will tell you I don't.

14:47:43 10 Q. So if I ask you if you knew

14:47:46 11 whether these reflected the projections that

14:47:50 12 you relied upon in paragraph, that you refer to

14:47:57 13 in paragraph 57 you can't give me the answer?

14:47:59 14 A. They may. I may be familiar with

14:48:01 15 looking at the document with the cover page on

14:48:03 16 it. So it is quite possible that if you give

14:48:06 17 me some time and I'll look at the backup and it

14:48:09 18 may tie in, but I looked at these a few days

14:48:13 19 ago and I just remember a different cover on

14:48:15 20 it.

14:48:15 21 Q. Okay. So you just don't know if

14:48:17 22 these are the projections, the March 2007

14:48:20 23 projections that you relied upon?

14:48:23 24 A. But if you give me a second I'll

14:48:25 25 look.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 220

1 MARIANNE DeMARIO

14:48:26 2 Q. Feel free.

14:50:53 3 A. I just checked 2008 and the
14:50:56 4 numbers appear to tie in. But I didn't check
14:51:01 5 all of the numbers.

14:51:02 6 Q. Okay. Plainly, if you turn back
14:51:06 7 to your Exhibit B1 and B2, those numbers
14:51:13 8 reflected in these charts accurately reflect
14:51:19 9 the projections from March 2007 that you're
14:51:22 10 relying on?

14:51:23 11 A. My Exhibits B1 and B2 accurately
14:51:27 12 you reflect the March 1, 2007 EMI projections.

14:51:30 13 Q. Right. If you look at the bottom
14:51:32 14 of B1, for example, it says "Source EMI Group
14:51:36 15 Operating Model 3/1/2007."

14:51:39 16 Do you see that?

14:51:44 17 A. Yes.

14:51:44 18 Q. We just don't know. What we
14:51:46 19 marked as DeMario Exhibit 11 is that operating
14:51:49 20 model?

14:51:50 21 A. 12.

14:51:50 22 Q. 12. Sorry?

14:51:51 23 A. I checked 2008 but that's
14:51:53 24 correct. It doesn't look like the document I
14:51:58 25 reviewed a few days ago.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 221

1 MARIANNE DeMARIO

14:52:09 2 Q. Now if you stay with me in your
14:52:14 3 Exhibits. Turn to Exhibit C1. What does that
14:52:25 4 reflect?

14:52:28 5 A. This is my May 2007 DCF
14:52:31 6 calculation.

14:52:40 7 Q. This is the data you arrive at in
14:52:42 8 employing your income method for the May 2007
14:52:46 9 valuation?

14:52:55 10 A. May I have that read back,
14:52:56 11 please.

14:52:56 12 (The pending question was read as
14:52:56 13 follows:

14:52:40 14 "Question: This is the data you
14:52:41 15 arrive at in employing your income method
14:52:44 16 for the May 2007 valuation?")

14:52:57 17 A. This is the data that I use for
14:53:00 18 my May 2007 income approach.

14:53:02 19 Q. And if you turn the page to
14:53:09 20 Exhibit C2 where it says 8/2007 valuation. Is
14:53:16 21 this the data that you use for your income
14:53:20 22 method calculations for your August 2007
14:53:24 23 valuation under the income method?

14:53:30 24 A. Yes.

14:53:39 25 MR. CARNEY: Why don't we change

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 222

1 MARIANNE DeMARIO

14:53:40 2 the tape quickly right now.

14:53:43 3 VIDEOGRAPHER: Here now marks the

14:53:45 4 end of tape 4 of deposition of

14:53:47 5 Ms. Marianne DeMario. The time is 2:53

14:53:49 6 p.m. We are now off the record.

14:53:51 7 (Recess taken.)

15:06:22 8 VIDEOGRAPHER: Here now marks the

15:06:34 9 beginning of tape 5 of the deposition of

15:06:36 10 Marianne DeMario the time is 3:05 p.m. We

15:06:41 11 are back on the record.

15:06:42 12 EXAMINATION CONDUCTED BY MR. CARNEY:

15:06:42 13 Q. Welcome back, Ms. DeMario. Can

15:06:44 14 you turn to Exhibit M as in Mary of the Fischel

15:06:49 15 report.

15:07:18 16 This page is entitled Comparison

15:07:20 17 of EBITDA Projections. It shows at the top

15:07:24 18 projections used in DeMario report. There is a

15:07:26 19 footnote to your Exhibit C1, which was the data

15:07:31 20 you used for your May 2007 DCF analysis;

15:07:38 21 correct?

15:07:38 22 A. Let me double-check --

15:07:39 23 Q. Sure.

15:07:40 24 A. -- whether the numbers are

15:07:41 25 accurate. Yes. These agree to my Exhibit C1.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 223

1 MARIANNE DeMARIO

15:08:06 2 Q. And Dr. Fischel then makes a
15:08:11 3 comparison between your projections in C1 with
15:08:15 4 projections found in some of the other
15:08:17 5 documents that we've looked at today; do you
15:08:19 6 see that?

15:08:23 7 A. Yes. It's important to note that
15:08:24 8 he's for some reason only selected some of the
15:08:29 9 projections. But he has selected three
15:08:35 10 projections here.

15:08:38 11 Q. Then there is a fourth set of
15:08:39 12 projections at the bottom under Terra Firma EMI
15:08:43 13 presentation; is that correct?

15:08:45 14 A. Yes. The EMI presentation to
15:08:47 15 co-investors from September 2007.

15:08:50 16 Q. Did you look at this chart when
15:08:52 17 you read the Fischel report?

15:08:54 18 A. Yes.

15:08:55 19 Q. Did you ask staff to pull the
15:08:59 20 documents that Professor Fischel refers to to
15:09:03 21 check his data?

15:09:05 22 A. I asked staff to verify that the
15:09:10 23 EBITDA numbers were correct. And to also pull
15:09:14 24 all the other EBITDA numbers that people were
15:09:17 25 using at or around this time.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 224

1 MARIANNE DeMARIO

15:09:20 2 Q. And as a result of that, with
15:09:22 3 respect to the first three comparisons that
15:09:24 4 Dr. Fischel makes in Exhibit M, did your staff
15:09:30 5 report back that the numbers were accurate?

15:09:33 6 A. I don't recall them telling me
15:09:35 7 they were inaccurate. So I will assume that
15:09:38 8 they're accurate.

15:09:39 9 Q. You have no reason to believe
15:09:41 10 those numbers are inaccurate?

15:09:42 11 A. I do not.

15:09:51 12 Q. And at the time, again, the time
15:09:52 13 you prepared your report, if you look at --
15:09:52 14 withdrawn.

15:09:56 15 Let's just take these three
15:09:58 16 quickly. The first was Terra Firma projections
15:10:06 17 indicates presentation to the IAC meeting from
15:10:08 18 May 20, 2007.

15:10:10 19 We looked at that presentation
15:10:12 20 earlier. It was marked as DeMario 3. DeMario
15:10:27 21 3. DeMario 3 is the IAC presentation from May
15:10:30 22 20, 2007. You testified that you had not seen
15:10:32 23 that document at the time that you prepared
15:10:35 24 your report; correct?

15:10:37 25 A. No. I've seen that document. I

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 225

1 MARIANNE DeMARIO

15:10:39 2 testified that I had seen that document.

15:10:40 3 Q. You had seen that one at the time
15:10:42 4 you prepared your report?

15:10:43 5 A. Yes.

15:10:43 6 Q. Did you look at the projection
15:10:49 7 data included within that report?

15:10:51 8 A. Yes.

15:10:54 9 Q. And did you use that projection
15:10:57 10 data in your own income approach analysis for
15:11:06 11 the fair market valuation of EMI?

15:11:09 12 A. I didn't use it to determine fair
15:11:11 13 market value. As I've previously testified in
15:11:14 14 my opinion it is inappropriate to use that
15:11:18 15 information to determination fair market value.

15:11:23 16 Q. That's because it reflects
15:11:25 17 specific expectations of Terra Firma at the
15:11:28 18 time?

15:11:28 19 MR. GRAVANTE: Objection to the
15:11:28 20 form.

15:11:28 21 A. It's because it reflects the
15:11:32 22 value that Terra Firma would bring to the
15:11:34 23 table. Not the value that Terra Firma would
15:11:36 24 receive.

15:11:39 25 Q. If you look back at Exhibit M,

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 226

1 MARIANNE DeMARIO

15:11:40 2 the next entry is the project Diaz memorandum
15:11:47 3 from May 17, 2007. We looked at that before.
15:11:51 4 That document you had not considered at the
15:11:53 5 time that you prepared your report; is that
15:11:56 6 correct?

15:11:56 7 A. That's correct.

15:11:58 8 Q. The next entry is Project Earl
15:12:00 9 report that we also just looked at a minute
15:12:03 10 ago. For that as well you did not consider
15:12:05 11 that document when you prepared your report?

15:12:08 12 A. That's correct.

15:12:08 13 Q. After looking at the data that
15:12:16 14 Dr. Fischel reflects here in Exhibit M, is
15:12:22 15 there anything that would cause you to change
15:12:25 16 any of the conclusions in your report?

15:12:27 17 A. No.

15:12:32 18 Q. You would agree that with respect
15:12:33 19 to all three of those entries that are
15:12:37 20 reflected in the first part of Exhibit M, that
15:12:44 21 the projections in the Terra Firma May 20
15:12:49 22 presentation and the Project Dice memorandum
15:12:52 23 and in the Project Earl memorandum are all
15:12:55 24 greater than the projections used in your
15:12:58 25 report?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 227

1 MARIANNE DeMARIO

15:13:03 2 MR. GRAVANTE: Objection to the
15:13:03 3 form.

15:13:03 4 A. Mathematically they are greater.

15:13:05 5 But as I explained before, they're measuring
15:13:09 6 different things than what I was measuring.

15:13:17 7 Q. When you say they were measuring
15:13:18 8 different things, precisely what do you mean by
15:13:23 9 that answer?

15:13:24 10 A. That these three EBITDA
15:13:26 11 projections are each prepared from the
15:13:32 12 perspective of a specific buyer and the
15:13:38 13 specific value that that specific buyer could
15:13:40 14 potentially bring.

15:13:45 15 And every time I talk about the
15:13:49 16 differences between what Terra Firma did, what
15:13:54 17 Cerberus did and what I did, I'm also taking
15:13:56 18 into account the fact that these did not have
15:14:00 19 access to all the relevant information.

15:14:04 20 Q. And the projections that you used
15:14:06 21 for EBITDA in your report, are those done on a
15:14:09 22 stand-alone basis for EMI; is that correct?

15:14:14 23 A. They are done on a stand-alone
15:14:17 24 basis as I previously defined stand-alone.

15:14:19 25 Q. If you look at the bottom of this

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 228

1 MARIANNE DeMARIO

15:14:21 2 chart there is a reference to the Terra Firma
15:14:23 3 EMI presentation to co-investors from September
15:14:25 4 2007. Why don't we just mark that quickly.

15:14:30 5 MR. CARNEY: Let's mark as DeMario
15:14:34 6 13 a multipage document entitled
15:14:40 7 Presentation to Co-investors September
15:14:43 8 2007. It is Bates numbered TF 0000815815
15:14:49 9 through 846.

15:14:50 10 (DeMario Exhibit 13 for
15:14:40 11 identification, Presentation to
15:14:40 12 Co-investors September 2007, production
15:14:44 13 numbers TF 0000815815 through 846.)

15:15:34 14 Q. Please take a look at that. Have
15:15:54 15 you seen this document before?

15:15:55 16 A. Yes.

15:15:57 17 Q. When did you first see this
15:15:58 18 document?

15:15:58 19 A. I don't recall specifically when
15:15:59 20 I first saw it.

15:16:00 21 Q. Had you seen it before you
15:16:02 22 prepared your report?

15:16:06 23 A. Yes.

15:16:06 24 Q. Do you recall why you looked at
15:16:10 25 this document?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 235

1 MARIANNE DeMARIO

15:22:21 2 be speculation for me to take that knowledge
15:22:23 3 and say they would have or would not have known
15:22:31 4 a specific piece of information.

15:22:39 5 Q. The same would be true for Terra
15:22:42 6 Firma's knowledge of the channel stuffing and
15:22:44 7 Brazil problems that you referenced earlier?

15:22:49 8 A. I specifically recall gaining
15:22:54 9 understanding that they did not understand the
15:22:56 10 extent of the channel stuffing until the March
15:23:00 11 2008 audit.

15:23:06 12 Q. Now, in order to use your
15:23:08 13 discount approach, do you need to assign a
15:23:11 14 discount rate?

15:23:14 15 A. In order to use the discounted
15:23:16 16 cash flow you need to have a discount rate.

15:23:19 17 Q. Did you select a discount rate
15:23:21 18 for your discounted cash flow analysis?

15:23:24 19 A. Yes.

15:23:24 20 Q. Do you recall what that rate was?

15:23:27 21 A. It is 10.7 percent.

15:23:31 22 Q. Let's just confirm. If we go
15:23:35 23 back to your table 3, which is on page 24.

15:23:59 24 Table 3 is entitled Weighted Average Cost of
15:24:06 25 Capital. Do you see that?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 236

1 MARIANNE DeMARIO

15:24:08 2 A. Yes.

15:24:08 3 Q. On the bottom WACC 10.7 percent.

15:24:11 4 Do you see that?

15:24:16 5 A. Yes, I do.

15:24:17 6 Q. Can you define for the jury what
15:24:20 7 weighted average cost of capital means?

15:24:22 8 A. It is the cost of capital to the
15:24:23 9 firm overall. So it is the weighted average of
15:24:29 10 the cost of equity and cost of debt.

15:24:32 11 Q. Do you use -- withdrawn.

15:24:33 12 Is this 10.7 percent reflected in
15:24:36 13 table 3 the discount rate you used for your DCF
15:24:41 14 analysis?

15:24:41 15 A. Yes.

15:24:42 16 Q. What is the basis for your
15:24:45 17 selecting a rate at that level?

15:24:50 18 A. Well as I explain in my report in
15:24:52 19 great detail, it is based on a standard capital
15:24:59 20 asset pricing model that looks at empirical
15:25:01 21 information concerning the risk free rate, the
15:25:03 22 equity risk premium, the specific premium as
15:25:10 23 measured by beta, size premium and the actual
15:25:18 24 cost of debt to the specific company.

15:25:23 25 Q. Are you aware the 10.7 percent

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 237

1 MARIANNE DeMARIO

15:25:26 2 rate that you selected was higher than the
15:25:30 3 midpoint discount rate selected by other market
15:25:36 4 participants that were doing valuations of EMI
15:25:39 5 before the May 21 bid?

15:25:42 6 A. May I have that read back,
15:25:56 7 please.

15:25:56 8 (The pending question was read as
15:25:56 9 follows:

15:25:23 10 "Question: Are you aware the
15:25:25 11 10.7 percent rate that you selected was higher
15:25:30 12 than the midpoint discount rate selected by
15:25:36 13 other market participants that were doing
15:25:38 14 valuations of EMI before the May 21 bid?")

15:25:58 15 MR. GRAVANTE: I'm going to object
15:25:59 16 to the form.

15:26:00 17 A. I am aware the discount rate that
15:26:01 18 I'm using is higher than the discount rate used
15:26:08 19 by other people, but it's something that I've
15:26:10 20 looked at and I feel very comfortable with my
15:26:13 21 discount rate.

15:26:14 22 Q. If you turn to Fischel Exhibit N
15:26:16 23 as in Nancy, can you do that quickly.

15:26:43 24 Again in this exhibit Dr. Fischel
15:26:47 25 draws a comparison between your 10.7 percent

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 238

1 MARIANNE DeMARIO

15:26:50 2 rate as shown in about the middle of the page
15:26:57 3 and the range of discount rates used in the
15:27:01 4 Project Dice credit approval memo, the Project
15:27:05 5 Earl leveraged finance memo, and the Merrill
15:27:09 6 Lynch Cerberus Project Record deck. Do you see
15:27:13 7 that?

15:27:14 8 A. Yes, I do.

15:27:15 9 Q. And had you read this exhibit
15:27:19 10 when you first read the Fischel report?

15:27:21 11 A. Yes.

15:27:22 12 Q. Did you have staff confirm the
15:27:26 13 data reflected here?

15:27:27 14 A. Again, I asked my staff to get
15:27:32 15 these documents and to also gather information
15:27:36 16 on the discount rates that were used at any
15:27:41 17 time to value EMI so we could understand why
15:27:48 18 people were selecting discount rates they were
15:27:50 19 using because, again, this is only a subset of
15:27:55 20 discount rates that people were using. It is
15:27:57 21 unclear to me why he only picks certain
15:27:59 22 discount rates.

15:28:04 23 Q. Of the three comparisons, the
15:28:05 24 four comparisons, if you include two entries
15:28:08 25 under the Merrill Lynch Cerberus entry, of the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 239

1 MARIANNE DeMARIO

15:28:14 2 four comparisons, do you have any reason to
15:28:17 3 believe any of the data reflected in this chart
15:28:18 4 is inaccurate in any way.

15:28:23 5 A. Are you asking me whether or not
15:28:24 6 I think Fischel picked up the wrong numbers?

15:28:26 7 Q. Correct.

15:28:27 8 A. I have no reason to believe that
15:28:28 9 to be true.

15:28:35 10 Q. You reference instructing --

15:28:37 11 A. Although I don't -- just to make
15:28:39 12 a point, I am not sure I would calculate the
15:28:43 13 weighted average the same way that he did. But
15:28:47 14 that's a calculation.

15:28:48 15 Q. And what are you referring to
15:28:49 16 there; his footnote 2?

15:28:51 17 A. For the Merrill Lynch he has a
15:28:53 18 line weighted average of Merrill Lynch. That
15:29:00 19 is footnote 3.

15:29:06 20 Q. Yes. Footnote 3. What would you
15:29:08 21 do differently?

15:29:09 22 A. I am not saying I would do it
15:29:10 23 differently, I'm just clarifying my answer.
15:29:14 24 This is a calculation and my answer was only
15:29:18 25 related to the accuracy of picking up the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 240

1 MARIANNE DeMARIO

15:29:21 2 numbers.

15:29:23 3 Q. But you would agree --

15:29:24 4 A. I may do it differently, I
15:29:26 5 haven't looked at it.

15:29:27 6 Q. But you'd agree your 10.7 percent
15:29:30 7 discount rate is higher than the numbers that
15:29:32 8 Dr. Fischel identifies in this chart; correct?

15:29:38 9 MR. GRAVANTE: Objection to the
15:29:39 10 form.

15:29:39 11 A. That is correct.

15:29:40 12 Q. Now, were there other valuation
15:29:44 13 documents that staff identified for you that
15:29:47 14 reflected other discount rates?

15:29:51 15 A. Yes.

15:29:51 16 Q. What were those documents?

15:29:52 17 A. Many of the analyst reports have
15:29:56 18 discount rates in them. There were valuations
15:29:59 19 performed by E&Y that included discount rates.
15:30:09 20 I believe that, I have to double-check in my
15:30:11 21 records, I believe that Greenhill may have had
15:30:13 22 some discount rates. They may not have, they
15:30:16 23 may not have shown the discount rates since we
15:30:18 24 only have the presentations. There may be
15:30:20 25 other discount rates. That's what I can

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 241

1 MARIANNE DeMARIO

15:30:22 2 recall.

15:30:22 3 Q. You don't recall any other
15:30:24 4 documents at this time?

15:30:25 5 A. That's what I can recall at this
15:30:27 6 time.

15:30:27 7 Q. Do you recall what specific
15:30:32 8 analyst report you looked at with respect to
15:30:35 9 discount rates?

15:30:36 10 A. Well in my report I discuss the
15:30:39 11 analyst reports that I looked at in table 2.

15:30:53 12 Q. Right. Table 2 reflects, I think
15:30:56 13 four different analyst reports?

15:30:57 14 A. Yes. So sitting here right now I
15:31:00 15 don't recall whether each of those analyst
15:31:01 16 reports separately identified the discount
15:31:07 17 rate. But I do recall there were at least
15:31:11 18 three discount rates. There may have been four.
15:31:14 19 There may have been one from each.

15:31:16 20 Q. Of all of the additional
15:31:20 21 documentation you asked staff to identify for
15:31:21 22 you, were any of the discount rates that you
15:31:26 23 identified higher than 10.7 percent?

15:31:29 24 A. Well I'd first like to just
15:31:31 25 clarify that discount rate is a measurement of

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 248

1 MARIANNE DeMARIO

15:39:56 2 without taking into account the step down.

15:39:57 3 Q. And the numbers, the growth rate
15:39:59 4 that you're applying at an earlier points of
15:40:02 5 time ranges from 2 percent to 4 percent?

15:40:04 6 A. I'd have to double-check the
15:40:06 7 numbers, but they are higher than 1 percent.

15:40:49 8 Q. Turn to paragraph 57 of Professor
15:40:51 9 Fischel's report, please. In paragraph 57
15:41:22 10 Dr. Fischel states, "Exhibit O reports the
15:41:25 11 enterprise value of EMI using the structure of
15:41:28 12 Ms. DeMario's DCF model, but replacing her
15:41:31 13 inputs with average value for projections,
15:41:33 14 discount rates and perpetuity growth rates from
15:41:35 15 DCF models prepared by first as part of the
15:41:38 16 auction process. The resulting estimate of
15:41:40 17 EMI's enterprise value of 4 .5 billion pounds
15:41:44 18 is approximately 71 percent higher than
15:41:46 19 Ms. DeMario's estimate of 2.6 billion pounds
15:41:50 20 and is greater than the 4.0 billion pound
15:41:52 21 transaction value paid by Terra Firma."

15:41:55 22 Do you see that?

15:41:58 23 A. Yes, I do.

15:41:59 24 Q. Do you agree with that statement
15:42:00 25 in paragraph 57?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 249

1 MARIANNE DeMARIO

15:42:02 2 A. I think it is a little silly. I
15:42:04 3 mean it is not my DCF model, it is a standard
15:42:10 4 DCF model. He is basically saying if you take
15:42:13 5 a standard DCF model and you put some different
15:42:18 6 numbers in you get different value.

15:42:20 7 Q. Is there anything wrong with that
15:42:22 8 statement if you put in different numbers for
15:42:24 9 projections, discount rate and perpetuity
15:42:26 10 growth rate that in fact would you get
15:42:28 11 different numbers for enterprise value; is that
15:42:33 12 correct?

15:42:33 13 A. Of course --

15:42:34 14 MR. GRAVANTE: Objection.
15:42:35 15 Objection to the form.

15:42:35 16 A. Of course you get different
15:42:36 17 numbers if you change the inputs to a DCF
15:42:39 18 model.

15:42:42 19 Q. Your disagreement with
15:42:43 20 Dr. Fischel is on the nature of the inputs that
15:42:46 21 are input into that model?

15:42:48 22 MR. GRAVANTE: Objection to the
15:42:50 23 form.

15:42:50 24 A. That's correct. I disagree with
15:42:52 25 the inputs he is putting in in Exhibit O.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 250

1 MARIANNE DeMARIO

15:43:05 2 Q. But you have no quarrel with his
15:43:06 3 conclusion if you use those inputs that he uses
15:43:09 4 in Exhibit O that the calculation under the DCF
15:43:16 5 approach is an accurate one?

15:43:18 6 MR. GRAVANTE: Objection to the
15:43:19 7 form.

15:43:19 8 A. Sitting here today I don't know
15:43:21 9 if my staff had time to redo Exhibit O. Maybe
15:43:25 10 they did. But we haven't had the report for
15:43:29 11 that long, and I don't -- I couldn't say
15:43:31 12 sitting here today whether or not they've had
15:43:33 13 time to do that.

15:43:34 14 Q. So sitting here today you have no
15:43:36 15 reason to believe that the data in Exhibit O is
15:43:40 16 inaccurate in any way?

15:43:43 17 A. I have no reason to believe that
15:43:45 18 the calculation in Exhibit O is inaccurate. I
15:43:49 19 believe that the data is inaccurate to use in a
15:43:53 20 DCF model to calculate the fair market value
15:43:57 21 you of EMI.

15:43:58 22 Q. Well is it inaccurate or simply
15:44:00 23 data you would not choose to use?

15:44:02 24 MR. GRAVANTE: Objection to the
15:44:04 25 form.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 251

1 MARIANNE DeMARIO

15:44:04 2 A. It's inaccurate.

15:44:08 3 Q. It is your opinion it is
15:44:10 4 inaccurate because why?

15:44:11 5 MR. GRAVANTE: Objection to the
15:44:13 6 form.

15:44:13 7 A. It is my opinion that it's
15:44:15 8 inaccurate because it includes values to a
15:44:20 9 specific buyer and it did not properly address
15:44:26 10 the risk facing the EMI cash flows.

15:44:37 11 And I have to double-check, but
15:44:39 12 it's likely that the cash flows may be
15:44:44 13 overstated because it doesn't reflect all the
15:44:47 14 relevant information because not all of the
15:44:50 15 parties had access to all of the relevant
15:44:51 16 information.

15:44:55 17 Q. Again, is the relevant
15:44:56 18 information to which you're referring that
15:44:59 19 information which we discussed earlier today?

15:45:00 20 A. Yes.

15:45:01 21 MR. GRAVANTE: Objection to the
15:45:08 22 form.

15:45:08 23 Q. Is it your view, Ms. DeMario,
15:45:13 24 that the risk facing the EMI cash flow
15:45:16 25 justifies your discount rate of 10.7 percent?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 252

1 MARIANNE DeMARIO

15:45:30 2 A. May I have that read back to me,
15:45:32 3 please.

15:45:32 4 (The pending question was read as
15:45:32 5 follows:

15:45:08 6 "Question: Is it your view,
15:45:09 7 Ms. DeMario, that the risk facing the EMI cash
15:45:15 8 flow justifies your discount rate of 10.7
15:45:18 9 percent?")

15:45:33 10 A. Yes. It is my opinion the 10.7
15:45:35 11 discount rate that I used appropriately
15:45:37 12 reflects the risk in the EMI cash flows that I
15:45:42 13 used. If you use different cash flows you
15:45:46 14 would use a different discounts rate.

15:45:49 15 Q. That's the case even though every
15:45:51 16 single comparison that Dr. Fischel relied upon
15:45:56 17 used a lower discount rate?

15:45:58 18 MR. GRAVANTE: Objection to the
15:45:58 19 form.

15:46:01 20 A. As I previously testified first,
15:46:04 21 the Fischel report I only selected certain
15:46:09 22 discount rates to include in that exhibit.

15:46:13 23 Second, the market and the other
15:46:18 24 folks making valuations were not aware of all
15:46:22 25 the risks.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 253

1 MARIANNE DeMARIO

15:46:27 2 If I can have the question read
15:46:39 3 back, I'll make sure I'm answering it.

15:46:43 4 (The pending question was read as
15:46:43 5 follows:

15:45:49 6 "Question: That's the case
15:45:49 7 even though every single comparison that
15:45:53 8 Dr. Fischel relied upon used a lower discount
15:45:57 9 rate?"

15:46:44 10 A. So given my previous answer, it's
15:46:46 11 my opinion my discount rate is the correct
15:46:48 12 discount rate.

15:46:51 13 Q. As you sit here the only other
15:46:56 14 valuation you've seen that used a discount rate
15:46:58 15 at or above 10.7 percent is the E&Y document to
15:47:04 16 which you referred?

15:47:15 17 A. Can I have that read back to me,
15:47:17 18 please.

15:47:17 19 (The pending question was read as
15:47:17 20 follows:

15:46:51 21 "Question: As you sit here the
15:46:52 22 only other valuation you've seen that used a
15:46:58 23 discount rate at or above 10.7 percent is the
15:47:02 24 E&Y document to which you referred?"

15:47:18 25 A. As I previously testified, I've

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 254

1 MARIANNE DeMARIO

15:47:19 2 seen other documents that include a discount
15:47:24 3 rate at or around the mid 10.5 range.

15:47:34 4 Q. Those would be the E&Y report you
15:47:36 5 spoke of and potentially other analyst reports
15:47:39 6 but you don't recall which ones?

15:47:41 7 A. I don't recall --

15:47:42 8 MR. GRAVANTE: Objection to the
15:47:42 9 form.

15:47:42 10 A. I don't recall if it was an
15:47:43 11 analyst report or if it was one of the other
15:47:52 12 consulting firms that were performing
15:47:54 13 valuations. It definitely was the E&Y report.

15:47:57 14 Q. Okay.

15:47:57 15 A. But I know I've seen other
15:48:01 16 sources that include a discount rate in the
15:48:05 17 over 10 range.

15:48:06 18 Q. You can't identify them
15:48:08 19 specifically right now?

15:48:09 20 A. That's correct.

15:48:12 21 Q. Did E&Y have access to all the
15:48:14 22 information you claimed the other participants
15:48:16 23 did not have access to?

15:48:20 24 A. The E&Y valuation was performed
15:48:23 25 after 2007.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 255

1 MARIANNE DeMARIO

15:48:24 2 Q. And do you have any basis of
15:48:27 3 knowledge for your statement that -- withdrawn.

15:48:29 4 Do you have any basis to believe
15:48:31 5 that E&Y had any better access to the
15:48:34 6 information than any other participant,
15:48:39 7 including Terra Firma in September 2007?

15:48:41 8 MR. GRAVANTE: Objection to the
15:48:45 9 form.

15:48:45 10 A. My understanding is that E&Y
15:48:46 11 performed a valuation for EMI. So I would
15:48:49 12 assume that they had access to all information.

15:48:54 13 Q. You don't know when that
15:48:56 14 valuation was performed?

15:48:57 15 A. It was post May 2007, but I don't
15:49:00 16 recall when.

15:49:07 17 Q. You utilize a market approach
15:49:09 18 also to your valuation; do you not?

15:49:10 19 A. Yes.

15:49:13 20 Q. What's the market approach?

15:49:17 21 A. The market approach, it is also
15:49:18 22 called a relative valuation. When you
15:49:23 23 determine the value of a subject company in
15:49:27 24 relation to the trading value and the trading
15:49:32 25 multiples of guideline public companies.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 256

1 MARIANNE DeMARIO

15:49:41 2 Q. Is it important in utilizing this
15:49:43 3 method to identify guideline public you
15:49:47 4 companies?

15:49:48 5 MR. GRAVANTE: Objection to the
15:49:53 6 form.

15:49:53 7 A. It is based on the relative
15:49:54 8 valuation in relationship to the guideline
15:49:57 9 trading companies. So it is important to
15:50:00 10 identify guideline trading companies, guideline
15:50:05 11 companies.

15:50:07 12 Q. Isn't it fair to say this market
15:50:08 13 approach is more appropriate when the company
15:50:11 14 being valued is not publically traded?

15:50:17 15 A. I wouldn't say that.

15:50:23 16 Q. Why not?

15:50:23 17 A. Because everybody uses the
15:50:25 18 relative valuation approach. Analysts use it
15:50:32 19 all the time.

15:50:45 20 Q. Would you -- withdrawn.

15:50:50 21 Turn to paragraph 85, if you
15:50:52 22 would.

15:50:52 23 A. Sorry, of my report?

15:50:54 24 Q. Yes. In paragraph 85 you say
15:51:15 25 "Guideline companies include those firms that

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 257

1 MARIANNE DeMARIO

15:51:17 2 provide similar services as EMI and firms that
15:51:20 3 are economically similar."

15:51:25 4 What are the services that EMI
15:51:26 5 provides?

15:51:28 6 A. EMI has two segments, recorded
15:51:31 7 music and music publishing. So they are in the
15:51:36 8 entertainment industry and the publishing
15:51:38 9 industry.

15:51:38 10 Q. What other companies are also
15:51:45 11 engaged in the business of recorded music and
15:51:47 12 music publishing?

15:51:54 13 A. The best comparable company to
15:51:56 14 EMI is Warner Music. They are engaged both in
15:52:01 15 recorded music and music publishing. They are
15:52:04 16 the only, if that's your standard for a
15:52:08 17 guideline company, they would be the only
15:52:10 18 company that would meet that standard.

15:52:14 19 Q. In paragraph 88 of your report
15:52:16 20 you select additional guideline companies as
15:52:22 21 well as Warner Music Group; isn't that correct?

15:52:23 22 A. Yes, I do.

15:52:24 23 Q. There are some 17 other companies
15:52:30 24 identified in paragraph 88; correct?

15:52:33 25 A. Just give me a second to make

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 258

1 MARIANNE DeMARIO

15:52:35 2 sure there are exactly 17.

15:52:49 3 There are 18 in addition to --

15:52:52 4 there are 18 including Warner. One of them

15:52:56 5 has, it is one company, but there are three

15:52:59 6 tracking stocks.

15:53:02 7 Q. Of the companies listed here,

15:53:03 8 other than Warner, not a single one relies upon

15:53:07 9 music publishing and music recording as the

15:53:10 10 substantial part of its business; isn't that

15:53:12 11 true?

15:53:13 12 MR. GRAVANTE: Objection to the

15:53:24 13 form.

15:53:24 14 A. May I have that read back.

15:53:26 15 (The pending question was read as

15:53:26 16 follows:

15:53:02 17 "Question: Of the companies listed

15:53:03 18 here, other than Warner, not a single one

15:53:06 19 relies upon music publishing and music

15:53:08 20 recording as the substantial part of its

15:53:11 21 business; isn't that true?")

15:53:27 22 A. Well, if you -- are you asking me

15:53:33 23 recorded music and music publishing?

15:53:35 24 Q. Correct.

15:53:36 25 A. Those are the two segments that

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 259

1 MARIANNE DeMARIO

15:53:37 2 comprise the EMI business and you testified
15:53:43 3 that Warner Music Group also is similar in
15:53:46 4 performing, in engaging that type of business.

15:53:53 5 My question is do any of these
15:53:55 6 other companies listed in paragraph 88 rely
15:53:59 7 upon music publishing and recorded music for
15:54:03 8 even a substantial part of their business?

15:54:05 9 MR. GRAVANTE: Objection to the
15:54:07 10 form.

15:54:07 11 A. So if your question is whether
15:54:10 12 one of them, any of these others rely on both
15:54:14 13 music publishing and recorded music, my answer
15:54:17 14 would be no.

15:54:27 15 Q. Turn to the paragraph 102. You
15:54:44 16 say in the second sentence "As the selected
15:54:46 17 companies are not pure comparables with the
15:54:47 18 exception of WMG, I reach a conclusion of
15:54:50 19 enterprise value by weighting the income
15:54:52 20 approach 75 percent and the market approach
15:54:55 21 25 percent."

15:54:56 22 Do you see that?

15:55:02 23 A. Yes.

15:55:02 24 Q. Isn't it true the basis of your
15:55:04 25 75 percent, 25 percent weighting is because the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 260

1 MARIANNE DeMARIO

15:55:07 2 market approach is not particularly useful to
15:55:10 3 your exercise?

15:55:14 4 MR. GRAVANTE: Objection to the
15:55:15 5 form.

15:55:15 6 A. I would not say that at all. If
15:55:17 7 I thought it was not particularly useful, I
15:55:19 8 would not have included it.

15:55:20 9 Q. Well you agree, you state
15:55:22 10 yourself the selected companies that you rely
15:55:25 11 upon in paragraph 88, other than Warner are not
15:55:28 12 pure comparables; correct?

15:55:31 13 A. That's correct.

15:55:32 14 Q. And then you agree to only weigh
15:55:35 15 the market value conclusion reached under the
15:55:41 16 market approach by 25 percent; correct?

15:55:44 17 A. I don't agree to do that. It's
15:55:46 18 my opinion that that's the appropriate way to
15:55:49 19 do it.

15:55:49 20 Q. It's your opinion that's the
15:55:50 21 appropriate way to do that?

15:55:52 22 A. Yes.

15:55:56 23 Q. You arrive at that weighting of
15:55:58 24 75 percent and 25 percent because it's your
15:56:00 25 opinion that the income method provides a more

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 261

1 MARIANNE DeMARIO

15:56:04 2 valid approach for determining fair market
15:56:09 3 value than the market method?

15:56:14 4 A. I would take exception with your
15:56:16 5 use of the term valid.

15:56:19 6 Q. Why do you weight the income
15:56:22 7 method 75 percent and the market approach 25
15:56:25 8 percent?

15:56:25 9 A. Because in recognizing, as I
15:56:33 10 clearly state here, that there is only one pure
15:56:37 11 comparable, Warner Music Group. So my
15:56:45 12 confidence in the DCF method is higher.

15:57:05 13 Q. Okay. Let's switch gears again,
15:57:07 14 Ms. DeMario, if we could. You offered damage
15:57:11 15 calculations under both New York and English
15:57:14 16 law; correct?

15:57:15 17 A. Yes.

15:57:15 18 Q. You were instructed to do that by
15:57:17 19 counsel?

15:57:17 20 A. Yes.

15:57:18 21 Q. And under New York law you
15:57:22 22 calculate both out-of-pocket damages and
15:57:24 23 consequential damages; is that correct?

15:57:25 24 A. That's correct.

15:57:28 25 Q. Define what you mean by

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 262

1 MARIANNE DeMARIO

15:57:29 2 out-of-pocket damages?

15:57:37 3 A. As I wrote in paragraph 117
15:57:45 4 "out-of-pocket damages should be calculated as
15:57:49 5 the difference between the value of the
15:57:51 6 consideration paid by Plaintiffs and the actual
15:57:53 7 value of the property received by Plaintiffs."

15:57:55 8 Q. In paragraph 121 you give a
15:57:57 9 definition of consequential damages under New
15:57:59 10 York law; is that correct?

15:58:02 11 A. Yes.

15:58:02 12 Q. How do you go about calculating
15:58:09 13 your consequential damages as set out in
15:58:12 14 paragraph 121 to 123, can you just describe
15:58:23 15 that for us?

15:58:24 16 A. Sure. I'm just trying to refresh
15:58:25 17 my recollection between New York law and
15:58:30 18 English law.

15:58:30 19 Q. Why don't we just stick with New
15:58:33 20 York law now?

15:58:33 21 A. I know. I don't want to confuse
15:58:35 22 them in my answer.

15:58:36 23 Q. That's right. That's right.
15:58:37 24 I'll let you answer.

15:58:45 25 A. So consequential damages under

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 267

1 MARIANNE DeMARIO

16:04:23 2 Q. Yes. On the tortious
16:04:24 3 interference.

16:04:25 4 A. That's correct.

16:04:28 5 Q. Then if you look at paragraph
16:04:30 6 123, just to finish up, you conclude that
16:04:32 7 consequential damages are zero for the August
16:04:36 8 2007 damages period; correct?

16:04:38 9 A. Yes.

16:04:39 10 Q. And that's because the value of
16:04:41 11 the Plaintiffs' interest in EMI increased to a
16:04:45 12 greater degree than, at least on a net basis
16:04:50 13 that their value in -- the value of Plaintiffs'
16:04:54 14 interest in EMI increased during that damages
16:04:56 15 period; correct?

16:04:59 16 A. That's correct.

16:05:17 17 Q. You also calculate damages under
16:05:19 18 English law as well; correct?

16:05:21 19 A. Yes.

16:05:25 20 Q. Do your calculations have three
16:05:27 21 components, make hold damages, consequential
16:05:32 22 damages and lost profit damages?

16:05:33 23 A. Yes.

16:05:34 24 Q. What are make hold damages? Let
16:05:36 25 me ask a better question. Do you define make

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 268

1 MARIANNE DeMARIO

16:05:38 2 hold damages in paragraph 125?

16:05:47 3 A. Yes.

16:05:47 4 Q. You say in the second sentence

16:05:49 5 "With respect to fraudulent misrepresentation

16:05:51 6 claims involving the sale and purchase of

16:05:53 7 shares, damages are normally calculated as the

16:05:56 8 difference between the purchase price of the

16:05:57 9 shares and their actual value on the date of

16:06:00 10 acquisition. However, in circumstances where

16:06:02 11 the Plaintiff is locked into the transaction by

16:06:04 12 reason of the fraud, damages are computed as of

16:06:07 13 the date of trial."

16:06:08 14 Do you see that?

16:06:10 15 A. I do. I just want to clarify my

16:06:14 16 earlier answer. When you asked me if I define

16:06:17 17 it in 125 I am expressing here my understanding

16:06:19 18 of it. I am not making it up.

16:06:22 19 Q. You are expressing your

16:06:23 20 understanding based on the instructions you

16:06:25 21 were given?

16:06:29 22 A. Correct.

16:06:29 23 Q. With that caveat, you state in

16:06:32 24 the last sentence of paragraph 125 that "In

16:06:34 25 circumstances where the Plaintiff is locked

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 269

1 MARIANNE DeMARIO

16:06:35 2 into the transaction by reason of the fraud,
16:06:37 3 damages are computed as of the date of the
16:06:40 4 trial."

16:06:41 5 Do you see that?

16:06:44 6 A. Yes.

16:06:44 7 Q. Now is it your opinion here the
16:06:46 8 Plaintiffs are locked into the transaction by
16:06:48 9 reason of the fraud?

16:06:51 10 A. I would ask to assume that they
16:06:52 11 were locked into the transaction. However,
16:07:02 12 given the interest in EMI as a 100 percent
16:07:08 13 interest in a non-marketable entity, it's
16:07:16 14 certainly reasonable to conclude that they're
16:07:21 15 locked into the transaction. This isn't the
16:07:23 16 purchase of a share of IBM where could you turn
16:07:26 17 around the next day and sell it.

16:07:29 18 Q. And your view -- let me ask, is
16:07:32 19 it your opinion EMI is a non-marketable entity?

16:07:38 20 MR. GRAVANTE: Objection to the
16:07:51 21 form.

16:07:51 22 A. I discuss on page 21 -- page 31,
16:07:56 23 paragraph 104 I say "100 percent interest in
16:07:59 24 the company, whether or not its shares are
16:08:01 25 publically traded is not readily marketable and

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 270

1 MARIANNE DeMARIO

16:08:05 2 is generally liquidated by a private sale or
16:08:07 3 public offering. The current owners of EMI
16:08:10 4 will be unable to liquidate their interests
16:08:12 5 until a sale or offering occurs, it will incur
16:08:15 6 costs to liquidate their interests and price
16:08:18 7 uncertainty."

16:08:23 8 Q. So is your definition of being
16:08:24 9 locked in, the inability to market the company
16:08:38 10 in some way to the public, is that your
16:08:39 11 opinion?

16:08:43 12 A. I'm drawing the distinction
16:08:44 13 between the liquidity of a share of stock, such
16:08:48 14 as IBM which if you wanted to, you could sell,
16:08:53 15 depending upon the time of day -- I don't know
16:08:55 16 if the market is closed -- you could sell it
16:08:57 17 right now. And at 100 percent interest in a
16:09:04 18 company which is relatively non-marketable in
16:09:08 19 comparison.

16:09:09 20 And, as I previously testified, I
16:09:12 21 was asked to calculate the make whole damages
16:09:17 22 using the June 2010 fair market value.
16:09:21 23 However, since you asked me my opinion, it
16:09:26 24 seems reasonable that to reach the conclusion
16:09:28 25 if they would be locked into the transaction

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 271

1 MARIANNE DeMARIO

16:09:31 2 and could not immediately turn around and
16:09:33 3 liquidate their investment.

16:09:38 4 Q. So let me understand. Are you
16:09:39 5 intending to offer an opinion at trial based on
16:09:44 6 your own independent work that EMI -- excuse
16:09:48 7 me, that the Plaintiffs are locked into the EMI
16:09:50 8 transaction?

16:09:52 9 MR. GRAVANTE: Objection to the
16:09:55 10 form.

16:09:55 11 A. As I previously testified, I was
16:09:57 12 asked to assume that and to use the June 2010
16:10:04 13 value you. If between now and trial I'm asked
16:10:08 14 to look at that specific issue, it's possible
16:10:12 15 that I could. But sitting here today I have
16:10:17 16 not been asked to do that.

16:10:17 17 Q. I'm just exploring your other
16:10:18 18 answer that it is reasonable to come to the
16:10:22 19 conclusion that the Plaintiffs are locked into
16:10:26 20 the EMI investment. So that's what I'm asking
16:10:29 21 about.

16:10:29 22 Have you studied that issue at
16:10:33 23 all?

16:10:33 24 MR. GRAVANTE: Objection.

16:10:33 25 Q. By you looking at evidence in

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 272

1 MARIANNE DeMARIO

16:10:34 2 this case?

16:10:35 3 MR. GRAVANTE: Objection to the
16:10:35 4 form. I'm sorry for interrupting.

16:10:39 5 MR. CARNEY: It's okay.

16:10:39 6 A. In general I looked at
16:10:41 7 marketability, not just in this instance, but
16:10:45 8 in other instances. So it would be inaccurate
16:10:48 9 for me to say no to the question have I studied
16:10:51 10 this because it really goes right to the heart
16:10:55 11 of marketability.

16:11:00 12 Q. Well let me ask a predicate
16:11:01 13 question. Is it your opinion that if Terra
16:11:08 14 Firma could sell 100 percent of EMI in a
16:11:11 15 private sale to another company, that it would
16:11:17 16 be locked in to the EMI investment?

16:11:20 17 MR. GRAVANTE: Objection to the
16:11:21 18 form.

16:11:21 19 A. I think that would require a
16:11:22 20 definition of the term locked in.

16:11:25 21 Q. And do you have a definition of
16:11:27 22 the term locked in?

16:11:27 23 A. I don't have a specific
16:11:30 24 definition as it applies to English law.

16:11:33 25 Q. So, is it fair to say in order

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 284

1 MARIANNE DeMARIO

16:46:56 2 included all of them. It's possible it didn't.

16:46:59 3 Sitting here today --

16:47:02 4 Q. You don't recall any other

16:47:03 5 valuation that utilized all 18 guideline

16:47:08 6 companies in the manner in which you did.

16:47:11 7 A. I think my answer is a little

16:47:12 8 different than I don't recall. It is probably

16:47:18 9 not something I ever even looked at. Because

16:47:20 10 of the approach that I took which I just

16:47:22 11 explained, but it's possible that one does.

16:47:32 12 Q. I am not sure I understand in

16:47:33 13 your last answer. It is possible that one

16:47:35 14 does. What's possible that one does?

16:47:38 15 A. It's possible that there is a

16:47:40 16 report that includes them all.

16:47:43 17 Q. But you just don't recall as you

16:47:45 18 sit here any of those?

16:47:48 19 MR. GRAVANTE: Objection.

16:47:49 20 Objection to the form.

16:47:52 21 A. As I just said, sitting here

16:47:54 22 today I couldn't tell you one way or the other

16:47:56 23 whether or not, there of is one out there that

16:47:59 24 does that.

16:48:00 25 Q. Do you recall if there is any

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 285

1 MARIANNE DeMARIO

16:48:01 2 specific analyst report that you're aware of
16:48:03 3 that uses all 18 companies as guideline
16:48:08 4 companies pursuant to a market methodology in
16:48:14 5 valuing EMI?

16:48:16 6 MR. GRAVANTE: Objection to the
16:48:16 7 form.

16:48:18 8 A. The analyst reports that I looked
16:48:20 9 at wouldn't have included all of them. Based
16:48:24 10 on my prior answer I explained the series of
16:48:28 11 steps that I went through.

16:48:33 12 Q. Let's switch gears. If you can
16:48:35 13 turn to paragraph 129, please.

16:48:41 14 A. Of which report, please.

16:48:43 15 Q. Your report, thank you.

16:48:57 16 Beginning paragraph 129 you discuss your lost
16:48:59 17 profits damages calculations under English law;
16:49:04 18 is that correct?

16:49:05 19 A. That's correct.

16:49:06 20 Q. And you were instructed that lost
16:49:08 21 profits would be a component of damages under
16:49:13 22 English law; is that your understanding?

16:49:15 23 A. That's correct.

16:49:19 24 Q. Can you describe for me generally
16:49:21 25 how you went about calculating the lost profits

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 286

1 MARIANNE DeMARIO

16:49:24 2 damages?

16:49:28 3 A. The first step was to measure the
16:49:30 4 internal rate of return that Terra Firma had
16:49:34 5 earned historically. So to do that I looked at
16:49:39 6 the cash flows of the projects that had been
16:49:50 7 entered into by Terra Firma and by Terra Firma
16:49:52 8 management that were either fully realized or
16:49:57 9 partially realized as of June 2010.

16:50:19 10 Q. In paragraph 130, the second
16:50:20 11 sentence says that "Terra Firma provided
16:50:22 12 information on its monthly cash inflows and
16:50:26 13 cash outflows by investment for all fully
16:50:28 14 realized and partially realized investments."
16:50:32 15 Do you see that?

16:50:33 16 A. Sorry, what paragraph are you on?

16:50:34 17 Q. Sorry, 130. Second sentence.

16:50:39 18 A. Yes.

16:50:39 19 Q. Did you receive some data from
16:50:43 20 terra Firma about cash flows and historical
16:50:45 21 internal rates of return?

16:50:49 22 A. Well I received information on
16:50:50 23 their cash flows, I calculated the historical
16:50:53 24 IRR.

16:51:04 25 MR. CARNEY: Let's mark this

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 287

1 MARIANNE DeMARIO

16:51:05 2 document as 14. This document was also
16:51:08 3 marked as Dolenec 34.

16:51:08 4 (DeMario Exhibit 14 for
16:51:08 5 identification, Spreadsheet, no production
16:51:30 6 numbers.)

16:51:30 7 A. I am going to take a Hall's. We
16:51:32 8 don't have to break or anything.

16:51:58 9 Q. This document is a printout of an
16:52:01 10 spreadsheet, as I understand it. Are you
16:52:05 11 familiar with the information reflected on
16:52:08 12 DeMario Exhibit 14?

16:52:36 13 A. Yes.

16:52:37 14 Q. Was that document provided to you
16:52:38 15 by someone at terra Firma?

16:52:43 16 A. I think it was provided as a
16:52:44 17 spreadsheet.

16:52:45 18 Q. Fair enough. It was a
16:52:46 19 spreadsheet provided to you by someone at terra
16:52:49 20 Firma?

16:52:49 21 A. Yes.

16:52:50 22 Q. Who is that?

16:52:55 23 A. It was provided to Mr. Fazzone.
16:52:57 24 I don't know who actually sent it to him.

16:53:00 25 Q. Do you know if you or Mr. Fazzone

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 288

1 MARIANNE DeMARIO

16:53:05 2 were provided with any other data from terra
16:53:07 3 Firma to assist you in your calculation of
16:53:13 4 internal rate of return or lost profits
16:53:16 5 damages?

16:53:20 6 A. I believe we received some
16:53:21 7 additional information about the partially
16:53:27 8 realized and the unrealized investments.

16:53:30 9 Q. What's that information?

16:53:35 10 A. I think we received certain
16:53:36 11 information about the current status of those
16:53:44 12 investments.

16:53:52 13 Q. With respect to Exhibit 14 that
16:53:54 14 we marked, would you agree that Exhibit 14
16:54:00 15 refers --

16:54:01 16 A. I'm sorry. To add to my prior
16:54:06 17 answer we may have also received I think we did
16:54:12 18 receive additional information on a couple of
16:54:15 19 minor transactions that were not included on
16:54:19 20 this analysis.

16:54:26 21 Q. This analysis that has been
16:54:28 22 marked as Exhibit 14 reflects cash flow
16:54:31 23 information stemming back to 1995; isn't that
16:54:35 24 true for certain investments?

16:54:40 25 A. Yes, that's true.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 289

1 MARIANNE DeMARIO

16:54:41 2 Q. It reflects investments made by
16:54:45 3 Terra Firma Capital Partners 1 and 2; is that
16:54:52 4 correct?

16:54:52 5 A. It reflects information for Terra
16:54:57 6 Firma Capital Partners 1 and 2 and the
16:55:02 7 management of Terra Firma as well.

16:55:05 8 Q. Now, Fund I is not a Plaintiff in
16:55:07 9 this case; correct?

16:55:09 10 A. That's my understanding.

16:55:10 11 Q. This data reflects both realized
16:55:16 12 and partially realized investments; is that
16:55:19 13 correct?

16:55:22 14 A. Yes.

16:55:22 15 Q. What does that mean to be
16:55:24 16 realized or partially realized for benefit of
16:55:26 17 the jury?

16:55:29 18 A. My understanding is if an
16:55:31 19 investment is characterized as realized that
16:55:37 20 Terra Firma is no longer invested in it, if it
16:55:42 21 is characterized as partially realized that
16:55:44 22 there has been cash out to some extent or
16:55:51 23 refinancing, some kind of cash out but they are
16:55:53 24 still invested in it.

16:55:54 25 Q. They are still invested in that

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 290

1 MARIANNE DeMARIO

16:55:56 2 company, that portfolio company?

16:56:01 3 A. That's correct.

16:56:04 4 Q. Does Terra Firma monitor
16:56:05 5 unrealized investments as well?

16:56:11 6 A. What do you mean by monitor?

16:56:12 7 Q. Well do any of the Terra Firma
16:56:15 8 funds have unrealized investments as well as
16:56:18 9 realized and partially realized investments?

16:56:23 10 A. Yes.

16:56:23 11 Q. What is an unrealized investment?

16:56:27 12 A. My understanding that is an
16:56:29 13 investment in which Terra Firma has increased
16:56:33 14 cash but has not cashed out any part of its
16:56:39 15 investment.

16:56:39 16 Q. Did you take account of any
16:56:41 17 unrealized investment in determining historical
16:56:48 18 internal rate of return for Terra Firma?

16:56:49 19 A. I did not.

16:56:50 20 Q. Why didn't you?

16:56:55 21 A. I didn't because the internal
16:56:57 22 rate of return is unknown on those investments?

16:57:04 23 Q. It is incapable of being
16:57:08 24 calculated, is that your testimony?

16:57:09 25 MR. GRAVANTE: Objection to the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 291

1 MARIANNE DeMARIO

16:57:14 2 form.

16:57:14 3 A. It's currently unknown. There is
16:57:17 4 no -- there are only cash outflows, there are
16:57:20 5 no cash inflows.

16:57:25 6 Q. So the internal rate of return
16:57:27 7 for those investments are unknown; is that fair
16:57:30 8 to say at this point?

16:57:31 9 A. They are unknown at this point,
16:57:33 10 that is correct.

16:57:41 11 Q. How did you go about calculating
16:57:43 12 an internal rate of return based on this data
16:57:45 13 in Exhibit 14?

16:57:51 14 A. What I did was summed up all of
16:57:53 15 the data which is shown in column A, column A,
16:58:00 16 the column marked all.

16:58:04 17 Q. That's on the far right side of
16:58:05 18 the spreadsheet?

16:58:05 19 A. Yes. Last two pages.

16:58:15 20 Q. Sorry, I didn't know if you were
16:58:16 21 done.

16:58:16 22 A. Then using the Excel function to
16:58:18 23 calculate IRR. I applied it to the range of
16:58:21 24 values.

16:58:30 25 Q. You concluded based on this data

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 292

1 MARIANNE DeMARIO

16:58:32 2 that Terra Firma management's historical IRR
16:58:35 3 was 43.66 percent between August 1995 and
16:58:40 4 January 2010; is that correct?

16:58:46 5 A. Let me just check the January,
16:58:47 6 what did you say January?

16:58:49 7 Q. Yes. I am reading from paragraph
16:58:50 8 131.

16:58:53 9 A. Yes. That's correct.

16:59:00 10 Q. You say "It is Terra Firma
16:59:02 11 management's historical annual IRR."

16:59:06 12 What does historical annual IRR
16:59:09 13 mean?

16:59:14 14 A. It is the internal rate of return
16:59:16 15 measured on an annual basis.

16:59:22 16 Q. Is it true your opinion is
16:59:23 17 measured historically Terra Firma achieved an
16:59:26 18 internal rate of review of 43.66 percent per
16:59:31 19 year for the years between August 1995 and
16:59:34 20 January 2010?

16:59:39 21 A. I think you misspoke.

16:59:40 22 Q. Okay. Why do you think I
16:59:42 23 misspoke?

16:59:46 24 A. You said something other than
16:59:48 25 internal rate of return.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 293

1 MARIANNE DeMARIO

16:59:52 2 Q. Is it true -- let me ask it
16:59:54 3 again.

16:59:54 4 Is it true your opinion is
16:59:56 5 measured -- is it true that your opinion is
16:59:59 6 that measured historically Terra Firma achieved
17:00:02 7 an internal rate of return of 43.66 percent per
17:00:09 8 year for the years between August 1995 and
17:00:13 9 January 2010?

17:00:16 10 A. That's correct.

17:00:16 11 Q. So that, just so I understand, so
17:00:19 12 that every year in that period, so for the year
17:00:24 13 1996, for example, Terra Firma achieved an
17:00:29 14 annual internal rate of return of 43.66
17:00:32 15 percent?

17:00:36 16 A. On average. So in a given year
17:00:38 17 it would be higher or lower.

17:00:41 18 Q. So for the 43.66 percent is an
17:00:46 19 average figure, so in one year it could be 30,
17:00:51 20 one year it could be 50?

17:00:53 21 A. That's correct.

17:01:00 22 Q. Just so I understand your opinion
17:01:01 23 then it is your opinion based on this data in
17:01:03 24 Exhibit 14 that for every year between August
17:01:08 25 1995 and January 2010, Terra Firma, on average

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 294

1 MARIANNE DeMARIO

17:01:14 2 achieved a 43.66 percent internal rate of
17:01:17 3 return? Is that your testimony?

17:01:21 4 A. With a year being measured as 12
17:01:23 5 months. I don't consider 1995 to be a year and
17:01:27 6 2010 to be -- January 2010 to be a year. If
17:01:33 7 that makes sense.

17:01:43 8 Q. Have you looked at actual IRR
17:01:48 9 figures reported by Terra Firma?

17:02:00 10 A. Exhibit 14 contains actual IRR
17:02:04 11 figures. They are not calculated, but it is
17:02:08 12 the underlying data for the IRR calculations.

17:02:11 13 Q. Have you seen IRR data reported
17:02:16 14 to Terra Firma from shareholders or prospective
17:02:20 15 investors?

17:02:23 16 A. I don't recall seeing that
17:02:24 17 information. It's possible that I have.

17:02:29 18 Q. Is this a gross IRR number that
17:02:31 19 you're calculating here in paragraph 131?

17:02:36 20 A. I don't know what you mean by
17:02:38 21 gross.

17:02:52 22 MR. CARNEY: Let's mark as
17:02:54 23 Exhibit 15 a multipage document numbered
17:02:58 24 TF 000097183 through 282.

17:03:05 25 (DeMario Exhibit 15 for

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 295

1 MARIANNE DeMARIO.

17:03:05 2 identification, Private Placement

17:02:58 3 Memorandum April 2006, production numbers

17:02:58 4 TF 000097183 through 282.)

17:03:35 5 Q. Flip through this document, if
17:03:37 6 you would, Ms. DeMario, and let me know if you
17:03:40 7 seen that before.

17:04:36 8 A. I don't recall having seen it.

17:04:42 9 Q. This is entitled Terra Firma
17:04:48 10 Capital Partners III L.P. Private Placement
17:04:51 11 Memorandum April 2006. Do you understand what
17:04:52 12 a Private Placement Memorandum is?

17:04:54 13 A. Yes.

17:04:54 14 Q. What is that?

17:05:05 15 A. It's a document that a firm would
17:05:06 16 issue when it was soliciting funds.

17:05:10 17 Q. Okay. Do you understand that
17:05:24 18 Terra Firma Capital Partners III was a fund
17:05:25 19 that was formed after the Funds I and II you
17:05:31 20 referred to in Exhibit 14?

17:05:38 21 A. That makes sense since it is
17:05:41 22 called Terra Firma Capital Partners III. Other
17:05:44 23 than that I have no understanding of when it
17:05:46 24 was formed in relation to the other funds.

17:05:48 25 Q. Can you turn to page 7193,

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 296

1 MARIANNE DeMARIO

17:05:56 2 please. Look down at the bottom, there is a
17:06:03 3 chart that says Summary of Terra Firma's
17:06:05 4 Investment Performance. It shows TCP I and TCP
17:06:13 5 II on the left side of the chart.

17:06:15 6 You go over to the right side
17:06:16 7 there is a column for gross IRR reflects 46
17:06:21 8 percent for TFCP I and 25 percent for TFCP II.
17:06:29 9 Do you see that?

17:06:29 10 A. Yes.

17:06:34 11 Q. Did you or your staff ask Terra
17:06:36 12 Firma for IRR data that it was reporting to
17:06:43 13 prospective investors for purposes of doing
17:06:45 14 your lost profits analysis?

17:06:48 15 A. That's something my staff may
17:06:50 16 have asked. I don't recall asking it myself.

17:06:53 17 Q. Looking at this column now,
17:06:54 18 looking at this chart with the column Gross
17:06:58 19 IRR, do you understand that to mean that TFCP I
17:07:06 20 had an internal rate of return of 46 percent on
17:07:13 21 average for each year of its existence since
17:07:15 22 1994?

17:07:25 23 A. I would be speculating if I was
17:07:27 24 to tell you what I thought this meant. Perhaps
17:07:34 25 if I read the document I could find a

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 297

1 MARIANNE DeMARIO

17:07:37 2 definition or an explanation of how it was
17:07:40 3 calculated.

17:07:45 4 Q. Were you aware the gross IRR
17:07:47 5 being reported as of April 1, 2006 for TFCP II
17:07:52 6 was 25 percent?

17:08:05 7 A. May I have that read back,
17:08:06 8 please.

17:08:07 9 (The pending question was read as
17:08:07 10 follows:

17:07:45 11 "Question: Were you aware the
17:07:46 12 gross IRR being reported as of April 1,
17:07:50 13 2006 for TFCP II was 25 percent?"

17:08:08 14 MR. GRAVANTE: Objection to the
17:08:09 15 form.

17:08:11 16 A. As I previously testified I don't
17:08:15 17 recall seeing any documents or any information
17:08:17 18 that showed what Terra Firma was reporting.

17:08:23 19 Q. Looking at this chart is it
17:08:25 20 reasonable to interpret this chart as
17:08:26 21 reflecting the internal rate of return for Fund
17:08:32 22 I and Fund II over the life of each respective
17:08:37 23 fund?

17:08:37 24 MR. GRAVANTE: Objection to the
17:08:42 25 form.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 298

1 MARIANNE DeMARIO

17:08:42 2 A. I think it's very common for
17:08:43 3 people to use the term IRR to refer to an
17:08:47 4 annual number. So I don't think that's a
17:08:51 5 reasonable assumption.

17:08:52 6 Again, if, perhaps if I studied
17:08:55 7 the document a little bit more I can determine
17:08:59 8 what they mean by that term gross IRR.

17:09:01 9 Q. Would it help to have a
17:09:03 10 definition of gross IRR?

17:09:05 11 A. It may.

17:09:07 12 Q. Turn to page 7277, if you will.
17:09:23 13 Top of the page says "Methodology for
17:09:25 14 calculating gross IRR."

17:09:28 15 It goes on to say in the first
17:09:29 16 sentence "Gross IRRs have been calculated for
17:09:32 17 each investment from the month when the first
17:09:34 18 material cash flow of each investment occurs
17:09:38 19 before deduction of management fees and carried
17:09:40 20 interest." Do you see that?

17:09:41 21 A. Yes.

17:09:42 22 Q. From reading that sentence is it
17:09:44 23 fair to conclude that gross IRRs as used by
17:09:48 24 Terra Firma refers to the internal rate of
17:09:51 25 return over the life of the investment?

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 299

1 MARIANNE DeMARIO

17:09:55 2 MR. GRAVANTE: Objection to the
17:09:58 3 form.

17:09:58 4 A. I don't think it changes my
17:09:59 5 answer that I would be speculating. But,
17:10:03 6 again, it's possible if I read through this I
17:10:05 7 would have a better understanding of what they
17:10:07 8 mean.

17:10:13 9 Q. Are you disputing the fact that
17:10:16 10 gross IRRs for purposes of this document are
17:10:18 11 calculated for each investment from the month
17:10:20 12 when the first material cash flow of each
17:10:22 13 investment occurs?

17:10:25 14 MR. GRAVANTE: Objection to the
17:10:25 15 form. Same objection.

17:10:28 16 A. I'm not disputing that. I'm
17:10:32 17 simply stating that that sentence does not
17:10:34 18 preclude the possibility that the gross IRR
17:10:42 19 number refers to an annual number. Especially
17:10:45 20 given that I have the underlying data. And I
17:10:49 21 calculated an annual IRR. So...

17:10:57 22 Q. So when it says in this
17:10:59 23 definition "gross IRRs have been calculated for
17:11:02 24 each investment from the month when the first
17:11:03 25 material cash flow of each investment occurs,"

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 300

1 MARIANNE DeMARIO

17:11:07 2 your testimony is that does not preclude an
17:11:10 3 interpretation of this sentence that would
17:11:13 4 provide that gross IRRs in fact mean average
17:11:19 5 annual IRRs?

17:11:21 6 MR. GRAVANTE: Objection to the
17:11:24 7 form.

17:11:24 8 A. It's common for the term IRR to
17:11:29 9 refer to an annual number the same way that
17:11:31 10 when people say interest rate everyone
17:11:35 11 understands that they mean an annual number.

17:11:37 12 Q. So nowhere --

17:11:38 13 A. So it's possible that to a
17:11:40 14 financial professional they don't need to state
17:11:42 15 something that they consider to be obvious to
17:11:49 16 the reader.

17:11:49 17 Q. Whether or not it's common, this
17:11:51 18 sentence does not refer to an average figure in
17:11:55 19 any way, shape or form; does it?

17:11:58 20 MR. GRAVANTE: Objection to the
17:12:02 21 form.

17:12:02 22 A. It doesn't use that term. But,
17:12:04 23 again, to go back to my interest calculation,
17:12:07 24 my interest example, people don't necessarily
17:12:10 25 say hey this is the annual interest rate.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 301

1 MARIANNE DeMARIO

17:12:15 2 Everybody understands an interest rate to be an
17:12:19 3 annual interest rate.

17:12:20 4 Q. Under your calculation you also
17:12:21 5 don't take account of any costs incurred by the
17:12:29 6 Terra Firma management or the fund in managing
17:12:31 7 the investments; isn't that true?

17:12:32 8 A. I don't take into account the
17:12:38 9 management fees.

17:12:39 10 Q. Do you take account of any other
17:12:41 11 costs other than management fees?

17:12:47 12 A. I take into account the ---

17:12:49 13 MR. GRAVANTE: Objection to the
17:12:50 14 form. Go ahead.

17:12:50 15 A. I take into account the cash
17:12:52 16 inflows, but I don't take into account the
17:12:56 17 management fees. I would expect the management
17:12:57 18 fees to cover all of the costs.

17:13:10 19 Q. Now from your calculations you
17:13:21 20 make the determination, do you not, that an
17:13:27 21 average annual IRR of 43.66 percent should be
17:13:32 22 used in calculating lost profits damages; isn't
17:13:36 23 that true?

17:13:50 24 A. Can I have that read back,
17:13:51 25 please.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 302

1 MARIANNE DeMARIO

17:13:52 2 (The pending question was read as
17:13:52 3 follows:

17:13:10 4 "Question: Now from your
17:13:11 5 calculations you make the determination,
17:13:22 6 do you not, that an average annual IRR of
17:13:29 7 43.66 percent should be used in
17:13:33 8 calculating lost profits damages; isn't
17:13:36 9 that true?")

17:13:52 10 A. It's my understanding that the
17:13:54 11 proper rate to use is the historical rate of
17:13:56 12 return. And I calculate the historical rate of
17:13:59 13 return to be 43.66 percent. That's the number
17:14:08 14 that I used.

17:14:08 15 Q. And the historical rate of return
17:14:10 16 that you calculate is based upon cash flows
17:14:14 17 from investments made as early as 1995; isn't
17:14:19 18 that true?

17:14:19 19 A. That's correct.

17:14:20 20 Q. And you use your IRR calculated
17:14:25 21 figure to determine damages suffered between
17:14:27 22 the period of May 2007 and June 2010; isn't
17:14:32 23 that true?

17:14:34 24 A. That's correct.

17:14:37 25 Q. Why is Terra Firma's returns on

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 303

1 MARIANNE DeMARIO

17:14:39 2 its investment from 1995 pertinent to the
17:14:44 3 returns they could have expected between May
17:14:47 4 2007 and June 2010?

17:14:49 5 MR. GRAVANTE: Objection to the
17:14:52 6 form.

17:14:52 7 A. As I previously testified it's my
17:14:54 8 understanding that under English law the
17:14:58 9 appropriate rate of return to use is the
17:15:01 10 historical rate of return.

17:15:04 11 Q. That's your understanding under
17:15:05 12 English law?

17:15:06 13 A. Yes.

17:15:07 14 Q. You were instructed that the
17:15:10 15 historical rate of return is the proper IRR
17:15:15 16 utilized in calculating lost profits damages?

17:15:18 17 A. That's correct.

17:15:18 18 Q. And does English law speak to how
17:15:22 19 far back in time one goes --

17:15:26 20 MR. GRAVANTE: Objection.

17:15:26 21 Q. -- to establish an IRR?

17:15:28 22 MR. GRAVANTE: Objection to the
17:15:32 23 form.

17:15:32 24 A. I don't know if it specifically
17:15:34 25 speaks to that. I know I calculated the

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 304

1 MARIANNE DeMARIO

17:15:37 2 historical rate of return.

17:15:38 3 Q. And were you told to take data
17:15:39 4 that stretches back to 1995?

17:15:41 5 A. I was asked to calculate the
17:15:46 6 historical rate of return and I did based on
17:15:48 7 all of the information that was available to
17:15:51 8 me.

17:15:51 9 Q. Based on the information that
17:15:52 10 Terra Firma provided you; correct?

17:15:55 11 MR. GRAVANTE: Objection to the
17:15:57 12 form.

17:15:57 13 A. My understanding is that this is
17:15:59 14 the full history of returns achieved by the
17:16:04 15 Terra Firma management. It's certainly not my
17:16:08 16 understanding that they selected the
17:16:11 17 information or gave me information only for
17:16:14 18 certain periods.

17:16:15 19 I asked for all of the
17:16:16 20 information and I received all of the
17:16:18 21 information.

17:16:19 22 Q. In calculating your historical
17:16:22 23 IRR, were you concerned at all that the
17:16:26 24 historical IRR would not provide a valid basis
17:16:29 25 for determining lost profits from investments

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 305

1 MARIANNE DeMARIO

17:16:34 2 made between May 2007 and June 2010?

17:16:38 3 MR. GRAVANTE: Objection to the
17:16:39 4 form.

17:16:39 5 A. I don't understand that question.

17:16:46 6 Q. Is it -- well in calculating your
17:16:48 7 internal rate of return, did you look at what
17:16:51 8 Terra Firma's actual internal rate of return
17:16:56 9 was for the period 2007 through 2010, the first
17:17:01 10 half of 2010, did you look at that data?

17:17:05 11 A. Well to the extent that that data
17:17:07 12 is included in here, I looked at it.

17:17:09 13 Q. Did you look at it on a
17:17:12 14 stand-alone basis?

17:17:13 15 A. I think I instructed my staff to
17:17:17 16 do sensitivity analysis to look at the
17:17:20 17 different periods.

17:17:20 18 Q. Did your staff come to the
17:17:23 19 conclusion that Terra Firma's internal rate of
17:17:26 20 return for the period 2007 to 2010 was anywhere
17:17:31 21 near 43 percent?

17:17:32 22 A. I don't recall the results of the
17:17:34 23 analysis.

17:17:34 24 Q. You don't recall at all.
17:17:36 25 Did your staff -- is it your

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 306

1 MARIANNE DeMARIO

17:17:39 2 testimony that your staff in terms of doing its
17:17:43 3 sensitivity analysis looked at actual returned
17:17:48 4 data for the period 2007 and 2010 and reported
17:17:51 5 that to you?

17:17:52 6 MR. GRAVANTE: Objection to the
17:17:54 7 form.

17:17:54 8 A. My testimony is that it's
17:17:56 9 something I asked my staff to do. I believe
17:17:59 10 they did report it to me. Sitting here today,
17:18:02 11 I don't recall what the numbers are. I mean
17:18:05 12 it's simple math. I'm not trying to hide
17:18:07 13 anything, but I don't recall what the numbers
17:18:09 14 are.

17:18:09 15 Q. Do you recall if Terra Firma even
17:18:11 16 achieved a positive rate of return in that
17:18:13 17 period?

17:18:13 18 A. I do not.

17:18:15 19 Q. Is it possible that in fact there
17:18:18 20 was a negative rate of return in that period?

17:18:20 21 A. I don't recall what the result of
17:18:24 22 the analysis was.

17:18:25 23 Q. Well, Dr. Fischel looked at that,
17:18:27 24 did he not, in his report?

17:18:29 25 A. I believe that he did.

CONFIDENTIAL
DeMario, Marianne - 7/19/2010

Page 307

1 MARIANNE DeMARIO

17:18:31 2 Q. And his conclusions were in fact
17:18:32 3 that Terra Firma did not achieve anywhere near
17:18:39 4 a 43 percent rate of return during that period;
17:18:42 5 isn't that fair?

17:18:43 6 A. I would have to look at his
17:18:45 7 report again to refresh my recollection.

17:18:50 8 Q. Sure. Let's look at it again
17:18:52 9 quickly. Turn to your Exhibit 6. Let's begin
17:19:04 10 at paragraph 65. Sorry, let's begin at
17:19:07 11 paragraph 64 let's start at of 65. Feel free
17:19:20 12 to look at paragraph 65 and 66 of Fischel.

17:20:19 13 Just let me know when you're
17:20:21 14 ready.

17:20:37 15 A. Okay.

17:20:38 16 Q. In paragraph 65 Dr. Fischel
17:20:48 17 quotes a letter from Guy Hands in the 2008
17:20:52 18 fourth quarter letter to the funds which states
17:20:58 19 "We all know that 2008 was probably the most
17:21:00 20 challenging investment year of our professional
17:21:03 21 lives. The dramatic global decline in stock
17:21:05 22 market values has destroyed more than five
17:21:08 23 years of growth in the value of listed
17:21:10 24 investments. Indeed, UK valuations are
17:21:12 25 effectively back to 1997 levels without